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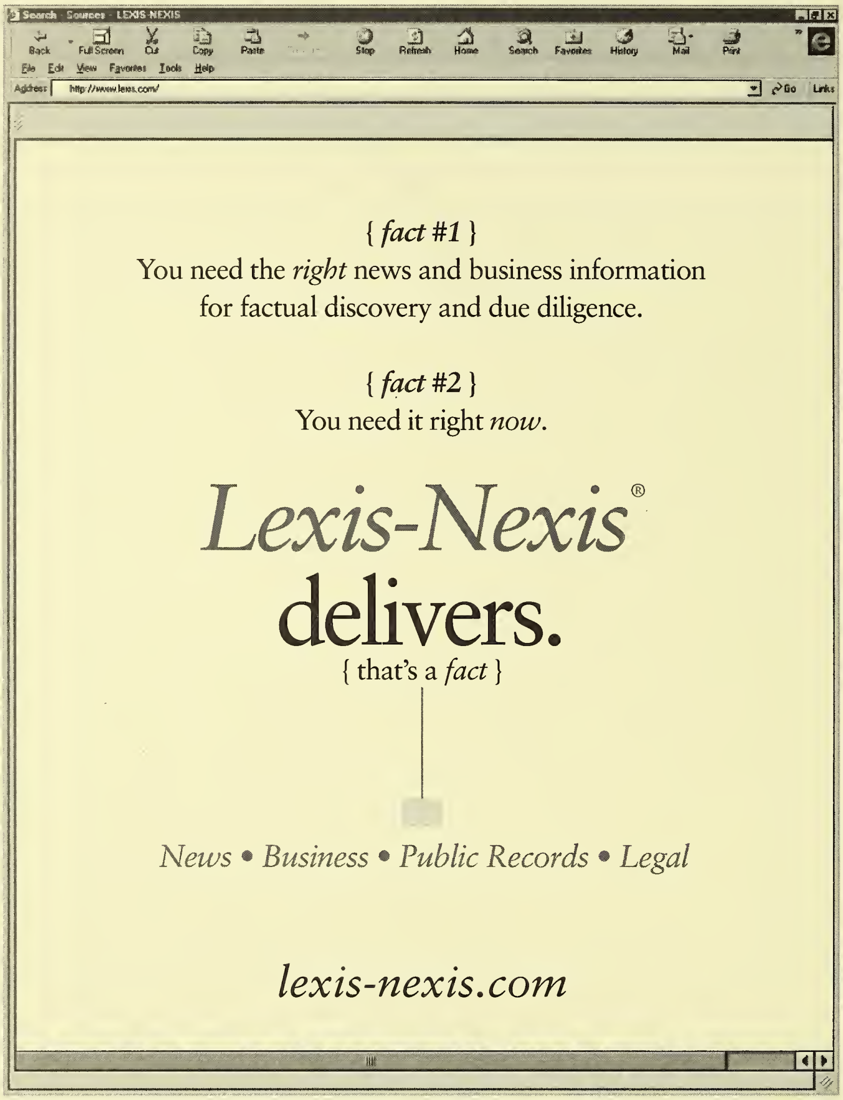

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FROM MAD JOY TO MISFORTUNE: The Merger of Law and Politics In The World of Gambling[*]

R. Randall Bridwell[**]

and

Dr. Frank L. Quinn[***]

INTRODUCTION

On June 18, 1999, the National Gambling Impact Study Commission Report was issued in response to a charge from Congress two years earlier to "conduct a comprehensive legal and factual study of the social and economic implications of gambling in the United States."[1] The report was based on extensive hearings and research conducted by the nine-member National Gambling Impact Study Commission and its staff, and was the most comprehensive gambling study ever conducted in the United States. It carried forward the work of a previous congressionally-authorized commission, whose *Final Report* was published in 1976.[2] The 1976 *Final Report* began by acknowledging that, "Gambling is inevitable. No matter what is said or done by advocates or opponents in all its various forms, it is an activity that is practiced, or tacitly endorsed by a substantial majority of Americans."[3] The National Gambling Impact Study Commission (hereinafter Commission) began its discussion of the impact of gambling in the United States in its 1999 report with a sobering recognition of the growth of all types of gambling in the United States since the 1976 study was completed:

---

[*] The title of this article was suggested by a passage from *The History of Gambling in England*, wherein the author observes that the gambler "[I]s either lifted up to the top of mad joy with success, or plung'd to the bottom of despair by misfortune, always in extreams, always in a storm." JOHN ASHTON, THE HISTORY OF GAMBLING IN ENGLAND 1 (Patterson Smith 1969) (1898) (citing CHARLES COTTON, THE COMPLEAT GAMESTER (1674)).

The authors wish to thank Mr. Jesse Kirchner, Ms. Lucy Grey McIver and Ms. Josephine Felton for their valuable assistance with the research of this article.

[**] Strom Thurmond Professor of Law, University of South Carolina School of Law. B.A., Midwestern University, 1967; J.D., Southern Methodist University, 1970; LLM. Harvard University, 1971.

The author was one of a team of attorneys who prosecuted the civil RICO action in *Johnson v. Collins Entm't Co.*, (*see infra* notes 14-17 and accompanying text), which helped bring video gambling to an end in South Carolina. Other involved firms were Richter & Haller, Charleston, South Carolina; Gergel Nickles & Solomon and The Strom Law Firm, both of Columbia, South Carolina, and Quarles & Brady Streich Lang, Phoenix, Arizona.

[***] A.B., University of North Carolina, Chapel Hill, 1972; Ph.D., University of South Carolina, 1986. Currently Director of the South Carolina Center for Gambling Studies and Clinical Director of Outpatient Services for Carolina Psychiatric Services, P.A. Dr. Quinn was an expert witness in *Johnson v. Collins Entm't Co.* (*see infra* notes 14-17 and accompanying text).

[1] Letter from Kay C. James, Chairman, National Gambling Impact Study

> Even the members of the previous federal study would be astounded at the exponential growth of gambling, in its availability, forms and dollars wagered, in the 23 years since they chose the words above to begin their work. Today the various components of legalized gambling have an impact—in many cases a significant one—on numerous communities and almost every citizen in this nation.[4]

Commission, to the President of the United States, Congress, Governors and Tribal Leaders (June 18, 1999), *available at* http://gov.info.library.unt.edu/ngisc/reports/intro.pdf.

[2] COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, FINAL REPORT (1976).

[3] NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT 7-1 (June 18, 1999) [hereinafter NGISC REPORT] *available at* http://govinfo.library.unt.edu/ngisc/reports/7.pdf.

[4] *Id.* The Commission also noted that:

> Although some would argue that gambling is a business like any other and, consequently, should be treated as such, in fact, it is almost universally regarded as something different, requiring special rules and treatment, and enhanced scrutiny by government and citizens alike.
>
> . . . .
>
> Unlike other businesses in which the market is the principal determinant, the shape and operation of legalized gambling has been largely a product of government decisions.

Id. at 1-4.

The Commission's 1999 report reflects the balance of pro- and anti-gambling sentiment of the Commission's nine members, but provides the most useful and complete outline of legal and social issues connected with gambling to date. The dominant tone of the 1999 report was that "the country has gone very far very fast regarding an activity the consequences of which, frankly, no one really knows much about."[5]

The Commission's cautious language is probably an understatement. Though gambling of some sort has appeared in just about every culture throughout recorded history,[6] it only became a gigantic nationwide business in the United States in the last twenty-five years. In fact, the enormous growth of gambling of all types in the last twenty-five years has prompted numerous legislative and judicial decisions made without the benefit of sound knowledge of the legal history of the subject, without benefit of sufficient facts as to how gambling is actually conducted, and without sufficient knowledge of the peculiar psychological problems gambling entails. What has actually happened is that, outside of rare circumstances where gambling is closely regulated (such as Nevada), there is an enormous gap between what the restrictions and operational rules set forth in legislative mandates and judicial decisions require and what actually happens in the day-to-day operation of gambling enterprises. With rare exceptions, it may even be reasonably argued that one of the things that makes gambling different from most other businesses is its approach to the law itself.

It has become an article of faith in America that, beginning in the late nineteenth century, the Progressive Movement and its attendant legal and political battles brought us at last a higher level of social protection from the alleged excesses of an unregulated "free market" economic system.[7] Today, the consensus view is that both state and federal governments perform specific though limited social welfare functions, such as consumer protection or the curtailment of economic predation or harmful business practices (such as monopoly, labor protection, unfair trade practices, truth in advertising and antitrust laws). The recent experience of one state, South Carolina, affords a revealing lesson on the accuracy of this belief.

---

[5] *Id.* at 1-7.

[6] For a "chronology of gambling events" throughout world history, see WILLIAM M. THOMPSON, GAMBLING IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, ISSUES AND SOCIETY ix-xxi (2001). *See also* BERTHA DAVIS, GAMBLING IN AMERICA 9 (1992); G. Robert Blakey, *Gaming, Lotteries and Wagering: The Pre-Revolutionary Roots of the Law of Gambling*, 16 RUTGERS L.J. 211, 262-65 (1985).

[7] *See generally* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO

The South Carolina story is nothing short of remarkable. The state went from a complete prohibition of gambling, which prevailed from 1868 until the mid-1980's, to a legal and political environment hosting more gambling sites than any other state in the United States, with a gambling business grossing nearly three billion dollars a year by the late 1990's.[8] Then, through a series of unprecedented political and legal battles, the state returned to its original prohibitionist stance. It then adopted a state-run lottery with no statutory plan for the use of the anticipated profits.[9]

How this happened is a story with immense importance to anyone concerned with the peculiar institution of legalized gambling. Yet it is not a story whose significance is confined to one political community or even one particular period of time. Rather it provides the most complete contemporary record of the intense resurgence of the apparently chronic social, legal, philosophical, moral and scientific problems addressed by the 1999 Commission report, problems that have dogged Western legal and political systems for at least six hundred years. From start to finish, it graphically illustrates how the separate perspectives of politics, law, morality and science fuse together on occasion around a central cultural issue to generate desperate political and legal struggles by which a political community defines itself. The fact that the arena of the conflict is one of

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F.D.R. (1955); LOUIS M. HACKER, THE SHAPING OF THE AMERICAN TRADITION (1947); HERBERT D. CROLY, PROGRESSIVE DEMOCRACY (1914).

[8] Clif LeBlanc, *Poker Wagers Top $3 Billion*, THE STATE (Columbia, S.C.), Oct. 22, 1999, at D1.

[9] *Lottery Has Nothing to Do with Education*, THE STATE, Jan. 4, 2000, at A-18. *The State* is South Carolina's largest newspaper. *See generally* Michael William Eisenrauch, *Video Poker and the Lottery Clause: Where Common Law and Common Sense Collide,* 49 S.C. L. REV. 549 (1998).

the United States of America, and the fact that the issues are those that have recurred at regular intervals throughout Anglo-American legal history, makes it a story that is uniquely useful. In South Carolina, between 1986 and the year 2000, gambling issues stimulated a series of legal battles that led not only to critical empirical investigations on the effects of gambling through extensive research, polling, interviews and individual case histories, but they also unearthed an unprecedented amount of factual information about the operation of modern gambling enterprises that employ cutting-edge technology. This data provides us with a fresh look at issues of human behavior relating to gambling that have mostly been seen darkly through the prism of intuition in the past.

The South Carolina story has numerous elements, some of which are political, some legal and constitutional, and some of which are factual and scientific. The story is partly about politics, due to the enormous amounts of money involved, and it raises questions about how well any government is able to handle a determined big-dollar special interest. It is partly legal history, since the law to a large degree defines the contours of the battleground on which the supporters and the opponents of legalized gambling have fought one another. The legal arsenal used by both sides of the issue includes both state and federal legislation and court decisions, and raises some fundamental issues concerning the relationship between the state governments and the federal government. It is partly scientific and is illuminated by an increasingly sophisticated understanding of human psychology and brain function, along with the theories this modern body of knowledge has spawned.

In order to make this study of the South Carolina experience intelligible and useful to both the lawyer and to those concerned primarily with gambling as an individual, psychological and social problem, we must to some extent treat the various legal and factual or scientific elements separately, in the hope that we can finally correlate both the law and the science in a useful way. This article is largely a chronicle of what our legal and political system has done and could do to deal with this controversial subject.

We will first examine how gambling arrived and took root in South Carolina and examine the particular modern form it took.[10] This question concerns politics and money, and provides some insight into the ways in which gambling entrepreneurs (as distinguished from other forms of business owners) use the legal and political system to their advantage.[11]

Second, we will examine what gambling is in the legal and definitional sense. We will focus primarily on English and American law, since these related legal systems contain an unparalleled historical, political and cultural record that is most relevant to us. We will explore how the law evolved concepts and definitions to distinguish between different forms of gambling, and the reasons employed by the law in permitting or restraining each form. This will require a separate analysis of familiar modern forms of gambling, which roughly divide into two distinct categories, each treated differently by our state and federal legal systems. These categories are wagering and betting on the one hand, as opposed to the lottery on the other.

Third, we will look at the mechanics of civil RICO actions for the recovery of gambling losses.[12] Fourth, we will examine the psychological and behavioral discoveries uncovered during the South Carolina gambling experiment that flourished from the mid-1980's until July 1, 2000. We will discuss some of the currently available scientific knowledge about the nature of gambling and the individual and social problems and costs associated with it. We will focus mainly on the elements of human psychology that make gambling a persistent phenomenon, and that help define the individual and social problems it can cause.

We hope to shed light on the centuries-old arguments and conclusions about gambling that previously came more from human intuition and observation than from scientific investigation of human behavior. We think this will also reveal how very often seven-hundred-year-old common sense accords with modern science.

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[10] Owing to standardized technology, the devices on which gambling is conducted are remarkably similar nationwide, even worldwide.

[11] In the process, we will also examine the state and federal laws that have been used to restrain and regulate gambling, and evaluate which of these available legal tools work and which do not.

[12] RICO, or the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. §§ 1961-68 (2000), a powerful tool for keeping gambling operations within lawful bounds, will be discussed more fully in this article.

I. THE WINNERS: THE SOUTH CAROLINA GAMBLING RENAISSANCE

> [T]he company engaged [in gambling] do, in general, exceed the bounds of their respective fortunes.
>
> Sir William Blackstone, 1783[13]

The political and legal battles that finally brought to light how South Carolina was transformed from a prohibitionist to an unlimited gambling state, and then back again, are instructive. Amazingly, it was a private lawsuit that finally publicized the problems resulting from South Carolina's experiment with unlimited and unregulated gambling, which lasted from July 1, 1993, to July 1, 2000, and that led to the state's eventual abolition of gambling.

On June 10, 1997, forty-three plaintiffs filed a class action lawsuit against sixty owners and operators of video gambling machines in state circuit court in South Carolina, alleging primarily that the conduct of gambling operations in violation of state law was a RICO violation that, this conduct amounted to an unfair trade practice under, state statutes, and that this conduct violated the state's constitutional prohibition on the conduct of a lottery.[14] This case, *Johnson v. Collins Entertainment Co.*, was removed by the defendants to federal district court on July 16, 1997.[15] This lawsuit assisted the counterrevolution against the gambling industry that was being waged in the state legislature through the extensive discovery and publicity it generated. It helped bring into the public view not only the unlawful means by which the gambling industry routinely operated, but also the mounting evidence that unlimited gambling was taking its toll on the state's populace while state officials were looking the other way.[16]

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[13] 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 171 (Garland Publ'g, Inc. 1978) (1783).

[14] Complaint, Johnson v. Collins Entm't Co., 500 S.E.2d 575 (S.C.1998) (97 CP 402076).

[15] First Amended Complaint, Johnson v. Collins Entm't Co., 508 S.E.2d 575 (S.C. 1998) (No.3:97-2136:17).

The *Johnson* case proceeded through extensive discovery, involving voluminous written discovery and depositions of video machine owners, operators, experts and plaintiffs who had lost money using the defendants' machines. From the fall of 1997 on, this constantly growing factual record focused the attention of the public on the video poker "industry," and the legion of lobbyists and politicians who had made it possible.[17] Incredibly, only through the disclosures occasioned by this lawsuit did the public learn how the whole video gambling business had started.

This is the story. By the mid-1980's, the status of gambling in South Carolina was as clear as could be—it was in all its forms illegal.[18] The South Carolina Supreme Court had adopted the conventional American rule defining a lottery and the "predominance of chance" rule associated with it.[19] The state's 1868 constitution contained a specific prohibition of lotteries which was carried forward in the constitution of 1895, under which the state operates today.[20] The *South Carolina Code* contained numerous provisions outlining the general ban on lotteries and other forms of gambling.[21]

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[16] The *Johnson* case proceeded down several paths. First, after removal from the state circuit court, the federal district judge, Hon. Joseph F. Anderson, Jr., certified the issue of whether video gambling constituted a lottery under the state's constitution and related laws. The state supreme court answered in the negative, and the federal action finally resulted in declaratory relief and permanent injunctive relief in favor of the plaintiffs, designed to prevent gambling operators from continuing their universal violation of state law. This ruling was stayed by the Fourth Circuit Court of Appeals, and later reversed by them, with an indefinite stay on the substantive claims other than injunctive relief. Thereafter, Judge Anderson certified a final set of dispositive questions to the state supreme court. The following discussion includes each phase in this case history.

[17] The Joint Appendix (J.A.) in the appeal of *Johnson v. Collins Entm't Co.*, *supra* note 14, to the Fourth Circuit Court of Appeals will be used where possible for citations to pertinent facts.

[18] Charitable bingo was legalized by a constitutional amendment in 1975. *See* S.C. CONST. art. XVII, 57 (Supp. 2001). Subsequently, statutes were passed to regulate and tax state-licensed bingo. S.C. CODE ANN. §12-21-3920 to 12-21-4295 (2000).

[19] *Darlington Theaters, Inc. v. Coker*, 2 S.E.2d 782, 786 (S.C. 1939). Under this rule, a lottery consists of offering the chance of winnings or a prize upon the payment of consideration by the participant. *Coker*, 2 S.E.2d at 786; *see infra* Section II (B) for a detailed analysis of the different forms of gambling recognized in Anglo-American law.

Despite this legal prohibition, there had long been a widespread underground network of gambling around the state. Though making payouts on machine gambling was illegal, state law enforcement did not have the resources to catch the people making payouts in arcades, restaurants and service stations around the state. The machine operators were much more careful when it came to federal law. On June 14, 1973, an I.R.S. official ranked South Carolina third behind Nevada and Tennessee in the number of federal gaming stamps, which qualify machines as gambling devices that can make payoffs.[22] Predictably, this gambling often led to local corruption. One of the defendants in *Johnson* was Henry Ingram, who by 1997 had become one of the state's largest video poker operators.[23] Ingram has admitted making payouts on his gambling machines since the 1970s.[24] In 1985, an undercover FBI agent, whose code name was "Domine," investigating illicit gambling in the state told Ingram that he needed some legal cover to start a large-scale gambling operation in South Carolina.[25] Domine told Ingram that northerners would patronize the game, and Ingram arranged for Sheriff Brantley of Jasper County to receive cash payments to look the other way.[26] To his credit, Sheriff Brantley stipulated that no locals would be involved with the "Yankee" gamblers.[27] For four months, FBI agents pretended to be the northern gamblers.[28] Finally, the FBI swept in and arrested Ingram and Brantley.[29] Ingram went to federal prison for four years, and, after his release, returned to amass a fortune worth $25 million by operating video poker machines routinely operated in violation of state law.[30]

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[20] S.C. CONST. art. XVII, § 7 (1895). The original provision in the state's 1868 constitution was carried forward in the 1895 constitution, and amended in 1974 to permit the game of bingo conducted at authorized and licensed functions:

> No lottery shall ever be allowed or be advertised by newspapers, or otherwise, or its tickets be sold in this State. The game of bingo, when conducted by charitable, religious or fraternal organizations exempt from federal income taxation or when conducted at recognized annual State and county fairs, shall not be deemed a lottery prohibited by this section.

S.C. CONST. art. XVII, § 7 (1974).

[21] S.C. CODE ANN. § 16-19-10 (1985) (prohibiting "Setting Up Lotteries"). This statute was typically broad, after the fashion of the English Act of 1698, and forbade "any lottery . . . or any undertaking whatsoever, *in the nature of a lottery*." (emphasis added). The Code also punished "Adventuring in Lotteries," S.C. CODE ANN. § 16-19-20 (1985), covering anyone who participated in or paid money into a lottery. The selling of lottery tickets was punished separately. S.C. CODE ANN. § 16-19-30 (1985). Unlawful games and betting were punished separately from lottery offenses. S.C. CODE ANN. § 16-19-40 (1985). Section 16-19-50 of the Code punished the keeping of gaming tables. Lastly, there was a provision that was to become pivotal to the entire battle over gambling in South Carolina. This section exempted all "coin operated machines with a free play feature[] provided that nothing herein shall authorize the licensing, possession or operation of any machine which disburses money or property to the player." S.C. CODE ANN. § 16-19-60 (1985). This provision was to allow a player to earn extra sessions of play on a game machine, but prevented the machine from dispensing anything to the player as a result of play (money or property).

[22] Douglas Pardue, *Video Poker Inc. New Rules Could Mean $80 Million Windfall*, THE STATE (Columbia, S.C.), March 21, 1999, at A11.

What enabled Ingram and the other video poker barons to achieve such a turnaround and such spectacular success was a two-stage change in South Carolina law. To get from the backroom penny-ante world of pinball machines and clandestine poker games to the profitable world of high-stakes gambling, the aspiring gambling operators of the 1970's and early 1980's realized that they needed two things. First, they needed to get rid of the *per se* ban on video game payouts. Second, they needed to achieve some way of making those payouts unlimited, since only this would provide the inducement to high-stakes gambling. Nobody is going to risk losing a lot unless they also believe that they can potentially win a lot. The first goal—establishing the legality of video poker payouts—was achieved in a remarkable way.

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[23] Cindi Ross Scoppe, *Take a Look at One of the People Our Legislators Want to Help*, THE STATE (Columbia, S.C.), Apr. 14, 1999, at A12.

[24] *Id.*

[25] *Poker Monitoring System Mustn't Be Delayed Again*, THE STATE (Columbia, S.C.), Apr. 14, 1999, at A12. Much of the credit for publicizing the facts during the *Johnson* litigation goes to Ms. Cindy Ross Scoppe, who wrote an ongoing, often courageous, commentary in *The State*, South Carolina's largest newspaper.

[26] Scoppe, *supra* note 23.

[27] Scoppe, *supra* note 23.

[28] Scoppe, *supra* note 23.

[29] Scoppe, *supra* note 23.

[30] Ingram had complained that video poker rival Fred Collins had conspired with Domine to put him away, and that Domine's primary motive in continuing the South Carolina sting operation was to be with a new girlfriend he had met in Hilton Head. Scoppe, *supra* note 23, at A12. Ingram reportedly offered Domine $1 million cash to take a lie detector test, an offer he could and did refuse. Scoppe, *supra* note 23, at A12. Ingram later attracted local attention with his attempt to subject his 1,700 acre Delta Plantation, which he bought with gambling money, to legal restrictions that would insure that no Yankee could ever own it. Scoppe, *supra* note 23, at A12.

Given the centuries of tumult and controversy over gambling in all its forms, and given the clear prohibition of gambling in the South Carolina Constitution and Code of Laws, one might expect that a proposal for legalized gambling would involve significant public and political debate. Six centuries of Anglo-American legal history, coupled with the economic, moral, religious, ethical and general social issues surrounding this age-old controversial subject, should have made this one volatile topic.[31] This may be the most astounding part of the whole story, but the General Assembly of South Carolina, beginning in 1986, initiated what in the space of fourteen years would become one of the largest organized gambling operations in the world, involving over two billion dollars in revenue annually, and creating more available gambling sites than any other state in the union, without originally knowing that it had done so. In 1986, a state senator named Jack Lindsay[32] secretly concocted a plan to amend the state's existing prohibitions on gambling to permit gambling to be conducted on video game machines.[33] These machines were at the time being promoted by the state's largest video game machine operator, Fred Collins, the arch-rival that Henry Ingram accused of setting him up for the sting operation discussed above.[34] The machines themselves employed conventional but sophisticated microprocessors that permitted familiar games of chance to be displayed on a video screen with an interactive touch feature.[35] On what came to be the predominant and most profitable version of

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[31] *See infra* Section II.

[32] Described by *The State*, as "the eloquent, persuasive and not-always-completely-honest senator from Bennetsville." Cindi Ross Scoppe, *Jack Lindsay's Worst Trick Wasn't Capital Gains Tax Cut,* THE STATE (Columbia, S. C.), Feb. 4, 1998, at A10. Bennetsville is situated in Marlboro County, a "poor Pee Dee county with a storied tradition of political corruption and poverty." Cindi Ross Scoppe, *Marlboro Election a Study in Poker, Pee Dee Politics*, THE STATE (Columbia, S.C.), May 31, 1998, at D2. As such, it provided the ideal climate for the video gambling business. Jack Lindsay, author of the secretive pro-gambling amendment of 1986, had been the lawyer for one of the state's largest video gambling operators, Alan Schafer, owner of "South of the Border" just inside the North Carolina-South Carolina state line on I-95. Schafer had served time for vote-buying, and had contributed thousands to fight restrictions on video poker. Cindi Ross Scoppe, *Poker Operators Can't Help Themselves; It's Their Nature*, THE STATE (Columbia, S.C.), Oct. 7, 1999, at A14. In 1997, Schafer backed candidate Tim Brown in a House race against Rep. Doug Jennings, a video poker foe. Scoppe, *Marlboro Election a Study in Poker, Pee Dee Politics*, *supra*. Brown owned a construction

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company where former House Speaker Pro Tem John I. Rogers had worked up until the time he resigned from the House and pleaded guilty to racketeering charges in 1991, the year Doug Jennings was elected, and the year Jack Lindsay died. Scoppe, *Marlboro Election a Study in Poker, Pee Dee Politics*, *supra.* Doug Jennings emerged in 1991 to run against former Senator Gene Carmichael, also a convicted vote-buyer. Scoppe, *Marlboro Election a Study in Poker, Pee Dee Politics*, *supra.* Jennings won and has remained a video gambling foe ever since. Jennings has stated, "In my law practice and in my own personal life, I started seeing examples of people whose lives it corrupted, and I just looked at it from a different perspective." Scoppe, *Marlboro Election a Study in Poker, Pee Dee Politics*, *supra.* Lindsay's secretive efforts to aid video gambling were necessitated in part by an opinion of the South Carolina Supreme Court that payouts from video machines were illegal, even if the machines themselves were not illegal games of chance. Powell v. Red Carpet Lounge, 311 S.E.2d. 719, 720-21 (S.C. 1984).

[33] Scoppe, *Jack Lindsay's Worst Trick Wasn't Capital Gains Tax Cut*, *supra* note 32.

[34] Scoppe, *supra* note 23.

[35] For a survey of the evolution of gambling devices in America, see *Report of Permanent Subcommittee on Investigations on Governmental Affairs*, 98th Cong. (1984) (Appendix) (prepared statement of Sen. Sam Nunn, U.S. S. Permanent Subcomm. on Investigations on Illegal Use of Video Poker Machines). A video poker machine is run by a computer program that is designed to pay off at a lower rate than that applicable to a conventional game using a standard fifty-two card deck. *Id.* "In poker, there are 2,598,960 possible winning poker hands in a 52-card deck, including the hands where a high card may be declared the winner. The video poker device establishes its profit potential by not paying off on all possible winning combinations." *Id.*

The fact that video gambling machines are microprocessors that do not pay off on all winning combinations is only one reason why virtually all players are destined to lose in extended play. *Id.* A mathematical formula originally developed by Blaise Pascal for a gambling acquaintance starkly illustrates the gambler's virtually hopeless situation. The formula, known as "Gambler's Ruin" has been the subject of many modern-day math lessons. For a good illustration of the formula, see *The Gambler's Ruin Problem: A Simulated Gambling Experience*, *available at* http://www.math.ucsd.edu/~anistat/gamblers_ruin.html.

these machines, players could replicate conventional card games such as five card draw.[36] The video gambling devices were deployed in public establishments located around the state, such as convenience stores, bars and truck stops, which were themselves owned either by the machine owners or by other businesses that leased the machines from their owners. In the instances in which the machine owners leased their machines, the profits derived from the operation of the video gambling devices were split between the machine owner and the local business, usually on a fifty-fifty basis. The trouble was that the law prohibited the use of such machines in a way that would amount to actual gambling. Though the machines had a "free play" feature, so that successful play could earn the patron one or more extra free games, the law prohibited the machines from dispensing not only money, but any form of "property."[37] Therefore, people could play all they wanted; they just could not legally win anything tangible, and the machines could not dispense anything tangible.

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[36] The machines visually replicated games of cards (poker, black jack, etc.) and other games of chance in the nature of a lottery ("lotto," "keeno," "bingo," etc.). Machines bore such names as "Pot of Gold," "Poker," "Omega," "Black Jack," "Multi Magic," "Double Up," "Turbo II," "Victor 6," "Wizard," "Phantom," "Turbo," "Players Choice," "Bingo," "2 in 1," "Hi Speed," "Type III" and "Foxtronic." These devices all provided the vehicle for electronic video games utilizing a video display and microprocessors and containing a feature whereby the patrons of such devices have the possibility of winning games or credits for free games.

The use of video poker machines does not involve the primary elements of skill associated with a conventional game of cards. These include: "(1) knowledge of the game's mathematics, (2) money management, (3) psychological deception, (4) betting courage." *Report of Permanent Subcommittee on Investigations on Governmental Affairs*, 98th Cong. 70 (1984) (Appendix) (prepared statement of William L. Holmes, Special Agent, Federal Bureau of Investigation).

Only a knowledge of the game's mathematics could assist a video poker player, and then only negligibly:

> However, play of an electronic video gambling device does not involve interaction which includes the other four skill factors. Since video draw poker devices are preprogrammed to retain a certain percentage of all coins inserted into the devices and/or credits won, the effect of a player's application of knowledge of the law of probability is reduced in the final outcome of play. A player of an electronic video draw poker device will attain only limited success, regardless of skill, because of the lack of interaction and the limitations of the device.

Id. at 71-72.

[37] S.C. CODE ANN. § 16-19-60 (1985). This section not only prohibited a gam-

Of course, the machine operators often paid off players in violation of the law, but existing remedies for the disappointed players who lost in illegal games were all but useless. Over the years, several individual lawsuits based on an antique anti-gambling statute, the Statute of Anne, had been brought and vigorously defended.[38] These resulted in relatively small individual recoveries by plaintiffs attempting to recoup their gambling losses as that statute provided. This naturally created a powerful disincentive to litigating individual claims. Though by 1999, the sum total of all losses on machines operated in South Carolina contrary to law was staggering, and there were numerous persons who had lost large sums of money, an absolute and unyielding defense strategy toward the random individual claims stemmed any large losses to the industry. However, as we shall see, the unyielding and uncompromising slash and burn defense strategy pursued by the gambling industry finally made possible its own undoing.

Through the practice of making illegal payouts, the state's machine operators had developed a profitable clientele, and they correctly surmised that more money could be made in high stakes gambling than in video amusements. More than anything, the gambling operators needed to create some legal way for the player to record and collect his winnings. It would have been politically impossible to simply authorize the machines to pay out unlimited amounts of money, since this would obviously permit wholesale gambling on such machines. In 1986, Senator Lindsay found a way to do secretly what could never have been done in an open democratic process, to legalize gambling machine payouts. As Chairman of the Senate Finance Commit-

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ing machine from distributing cash, but also from distributing any document or other "property" that could be redeemed for cash. *Id.*

[38] 9 Anne Ch. 14 (1710) was first enacted by Parliament in 1710 and by the South Carolina General Assembly in 1712. *See infra* Section II. This statute allowed both the losing gambler and third parties to recover treble damages from illegal gambling in a civil action. The South Carolina version of the Statute of Anne, S.C. CODE ANN. § 32-1-10 et seq. (1991), is now applicable only to "gambling activities not allowed by law." 125 Stat. 1319 (1999).

tee, he proposed a technical amendment to the State Budget Bill (among hundreds that are routinely made in the final stages of the budget process). No one appeared to have even noticed the amendment, much less commented on it. The Lindsay amendment struck two words out of the statutory ban prohibiting any gaming machine from disbursing "money or property."[39] The new statute only prohibited the disbursing of money, and the words "or property" were deleted.[40] Thereafter, the machines could print documentary records of the "free plays" earned by a player. These would constitute "property,"which the machines could dispense. The player could then exchange his free plays for cash. The machine print-out was a type of property which legally could be won by playing the machine. Yet it served as a kind of currency denominated in so many "free plays," each having a set cash value. After one or more games, a player simply took his "free play" printout, which constituted "property" that he had won and which was dispensed by the video machine, and exchanged it for cash at the cash register of any establishment that housed the machine. What was to prevent a player from winning a large number of "free plays," and thus converting them into a large sum of cash? The ability to employ "free play" documents as cash vouchers was the key to high-stakes gambling and was seen as the key to inducing players to risk large sums of money. This ingenious formula allowed the machine operators to offer machine gambling for unlimited winnings and potentially converted every convenience store, gas station, or backroom into components of a gigantic state-wide gambling operation.[41] It finally became clear what Lindsay had done when Mr. Terry Blackmon was arrested for paying cash for "free plays" won on a video machine at his grocery store in Lancaster, South Carolina.[42] Blackmon argued that, because of Lindsay's amendment, his machine could dispense "property," the free-play voucher, and he could pay money for that document.[43] In 1991, a reluctant South Carolina Supreme Court agreed.[44]

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[39] S.C. CODE ANN. § 16-19-60 (1985). The amendment also provided that "coin operated non-payout machines with a free play feature" are exempt from the statutory prohibition covering "any vending or slot machine . . . or other device pertaining to games of chance." *Id.*

[40] Act effective June 18, 1986, Part II, § 26B, 1986 S.C. Acts 540.

[41] Once the majority in the state House of Representatives caught on to what Lindsay had done, they tried year after year to repeal Lindsay's change, but were always blocked by the democratic majority in the state Senate. Cindi Ross Scoppe, *Video Poker–An Industry That Thumbs Its Nose at Our Laws*, THE STATE (Columbia, S.C.), Apr. 28, 1999, at A14. In 1998, the House approved a bill to ban video poker outright. When the bill went to the Senate, Democratic majority leader John Land launched a ten day filibuster that prevented the bill from ever

It is hard to imagine a more secretive or obtuse method of revolutionizing a whole area of law. Rather than legalizing a Las Vegas in South Carolina, which would have been politically impossible, the legislature unwittingly converted the entire state into one big casino, with a relatively small number of machine owners controlling the vast majority of video machines. Lindsay died in 1991, just before he was to be indicted for helping engineer a "bribery tainted, $22 million retroactive capital gains tax cut" favoring selected beneficiaries.[45]

However, Lindsay's legislative legacy allowed the new gambling "industry" to take shape after he died in 1991. The legislature reacted to early warnings that this unexpected and unintended gambling business was causing extensive losses to the people of the state and creating extensive social costs.[46] This eventually led to a restructuring of video gambling law in 1993. In the meantime, having eliminated the *per se* ban on video machine payouts through Senator Lindsay's secret amendment, the gambling operators needed to achieve their second major goal—to make sure that the now legal payouts on the machines would be unlimited in amount. Technically and legally, they failed to achieve this goal. In reality, they achieved it with ease. The gambling operator's strategy was to support a new statute that contained some provisions which

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coming to a vote. Chuck Carroll & Douglas Pardue, *Kings & Jokers–Part 1 Inside the South Carolina Video Poker Wars*, THE STATE (Columbia, S.C.), Aug. 1, 1999, at A9.

[42] *Video Poker Editorial Fools Readers on 'State's'* Intent, THE STATE (Columbia, S.C.), Feb. 4, 1998, at A10.

[43] State v. Blackmon, 403 S.E.2d 660, 661-62 (S.C. 1991).

[44] *Blackmon*, 403 S.E.2d at 661-62.

[45] Scoppe, *Jack Lindsay's Worst Trick Wasn't Capital Gains*, *supra* note 32. .

[46] *See* W.N. Thompson, South Carolina Policy Council Education Foundation Report, *An Economic Analysis of Machine Gambling in South Carolina* (1999).

they favored, and that contained some provisions which they opposed. They simply ignored the parts they opposed.

By 1993, the state legislature had begun formulating and debating a lengthy regulatory statute that affirmed the legality of licensed video gambling machines, but also yielded to anti-gambling forces by establishing a cap on machine payouts in order to reduce the extravagant risk-taking induced by high potential winnings. The struggle over video gambling largely took place in the state Senate, in which pro-gambling forces normally retained a majority on key issues and at least maintained sufficient strength to sustain a filibuster on any gambling-related issue. The majority of the House of Representatives was always against video gambling. In fact, in its 1992 session, the legislature came within one vote of banning video poker payouts altogether.[47]

These opposing political forces essentially reached a compromise when, on July 1, 1993, the legislature enacted the Video Game Machines Act (VGMA).[48] The most significant provision of the VGMA was a limit on the amount of money that could be won by a player during any single twenty-four hour period to the sum of $125.00.[49] It was clearly recognized by the legislature that the inducement to risk large sums of money on video gambling was the prospect of large winnings.[50] The almost instantaneous speed of the microprocessor-driven machines allowed players to play as many as twelve hands per minute, and the possibility of large winnings (which were routinely advertised on individual machines by an illuminated "jackpot" display and in the visible pay tables appearing on the screen) induced players to literally pour money into the machines.[51] The statute sought to eliminate the inducement to gamble large sums quickly by capping the winnings that would be possible in any twenty-four hour time period. Further, the VGMA declared that no person could "offer or allow to be offered any special inducement to a person for the playing of machines."[52] Offering any "special inducement" to play the machines was punishable criminally by imprisonment for not more than two years and by a potential fine of $10,000.00 per violation.[53]

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[47] S.C. S. J. at 90, May 28, 1992.

[48] S.C. CODE ANN. § 12-21-2703 (2000), *repealed by* 1999 Act No. 125, § 8, eff. July 1, 2000. The Video Game Machines Act provided that video gaming could be conducted only on machines registered and licensed by the State, and set up extensive and precise regulations on the operation of licensed machines. *Id.* On March 23, 1993, the state attorney general, Travis Medlock, announced plans to file a lawsuit to ban video poker payouts as illegal under the state's constitutional ban on lotteries. Michael Sponhour, *In 1868 Lottery Ban, Video Poker Foes See Winning Hand*, THE STATE (Columbia, S.C.), Dec. 14, 1997, at A1. This forced pro-gambling forces in the Senate to capitulate to the $125.00 cap on winnings. Also, the South Carolina Supreme Court had held that a gambler could use the state version of the Statute of Anne, S.C. CODE ANN. § 32-1-10 (1991), to recover gambling losses, even if the games were legal under state law. Berkebile v. Outen, 426 S.E.2d 760 (S.C. 1993). The supreme court later reiterated this opinion in 1999. Justice v. The Pantry, 518 S.E.2d. 40 (S.C. 1999). The strange result was that the VGMA legalized gambling (so long as no payouts of over $125 were made in a single day), but that losses could be recovered under the Statute of Anne. Under current law S.C. CODE ANN. § 32-1-10 (1991) combines with Act No. 125, Pt. VI, Section 23(c), General and Permanent Laws of South Carolina (1999), to allow recovery of gambling losses.

[49] S.C. CODE ANN. § 12-21-2791 (1993), *repealed by* 1999 Act No. 125 Part I,

The anti-gambling House of Representatives reasonably thought they had enacted a law which, though it approved the legality of cash payouts for machine play, sufficiently limited the incentive to gamble so as to avoid the serious problems that

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§ 8, eff. July 1, 2000. Since the mechanism used by gambling operators was to redeem the printed records for "free plays" produced by the machines for cash in a separate transaction, the statute limited the amount that could be paid out in this fashion. The statute read:

> Any location which operates or allows the operation of coin-operated machines pursuant to Section 12-21-2720(A)(3) which provides payouts shall limit the cash payout for credits earned for free games to two thousand five hundred credits a player a location during any twenty-four hour period. The cash value of credits for each free game is limited to five cents.

Id.

[50] *Id.* Justice v. The Pantry, 496 S.E.2d 871, 875 (S.C. Ct. App. 1998). The court noted, "[l]ikewise, the clear intent of Section 12-21-2791 is to prevent excessive gambling by limiting the amount of cash payouts for winnings on video poker machines." *Justice*, 496 S.E.2d at 875.

[51] The machines deployed by the gambling operators went through several mechanical revisions that allowed them to accept large bills, often up to $100.00 at a time.

[52] S.C. CODE ANN. § 12-21-2804(B) (2000).

[53] S.C. CODE ANN. § 12-21-2804(F) (2000). This offense met the requirements of RICO Section 1961(1)(A), and could serve to define a "predicate act" for a RICO civil action under RICO Section 1964(c).

attended high stakes, unlimited gambling. The payout cap was a technical defeat for South Carolina's gambling operators, but it was one they were able to overcome with surprising ease. They decided that they would simply ignore the law. Taking a page from the legal "realists," the operators surmised that the new law capping daily winnings at $125.00 was not really a law at all if no one bothered to enforce it. Achieving this profitable end proved to be easier than they had thought.[54]

Despite the tough new rules in the 1993 statute designed to remove the inducements of high stakes gambling, the number of machines in South Carolina literally exploded. By 1999, the number of gambling locations rose from an unknown number of clandestine and illegal operations to over 7,000 retail locations where unlimited gambling was carried on. The total number of machines rose to over 36,000. Profits and revenues climbed an average of twenty percent per year, reaching a total of over three billion dollars in 1999, with over $835 million in profits for the machine owners and the locations.[55] The primary reason for the explosive growth of video gambling after the 1993 statute was that its payout restrictions were universally ignored by the operators, and they formed a very shaky but successful alliance to employ their enormous newfound fortune to neutralize the political and legal systems of the state.[56]

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[54] It is worth noting that the original VGMA of 1993 allowed a county-by-county referendum on whether to allow video gambling. Eleven South Carolina counties, in which the problems related to video were already evident, voted to ban it. Thirty-five other counties voted to allow it. Bill Hughes & Sammy Fretwell, *Payout Goes Up in Smoke Gamblers Lose Bet in 11 Counties*, THE STATE (Columbia, S.C.), Nov. 10, 1994, at B1. The gambling operators immediately challenged the referendum, and it was declared unconstitutional under the state's constitutional requirement that criminal laws be uniform state-wide. They prevailed in *Martin v. Condon*, 478 S.E.2d. 272 (S.C. 1996), thus making video gambling legal throughout the state under the VGMA.

[55] David Plotz, *Busted Flush*, HARPER'S MAGAZINE, Aug. 1999 at 64; LeBlanc, *supra* note 8, at D1. In 1998, over $660 was wagered on video machines by every man, woman and child in South Carolina. First Amended Complaint, Johnson v. Collins Entm't Co., 508 S.E.2d 575 (S.C. 1998) (No.3:97-2136:17); Mem. Op. On Pl's Mot. Part. Summ. J. at 3. Despite the fact that, by 1998, the video gambling industry took about half as much money from the citizens of the state as the government itself took, the Department of Revenue, charged with enforcement of the video gambling laws, remained inert. Scoppe, *supra* note 41. Even though Governor Beasley notified the director of the D.O.R., Mr. Burnie Maybank, of the approach that was being used by the plaintiffs in *Johnson*, Mr. Maybank advised otherwise, citing the industry's "aggressive litigation strategy." Scoppe, *supra* note 41. Incredibly, Maybank recommended that the state rely on the efforts of the *Johnson* plaintiffs to enforce the law. Scoppe, *supra* note 41.

There were some polite subterfuges along the way so as to give a superficial, often comical appearance of legality to the now-universal unlimited payouts. The machines were adjusted so that each "free game" receipt would be capped at $125, but the operators routinely paid for as many $125 tickets as the player had won, often getting the player to sign a false acknowledgment that they had only won $125. Several other curious procedures were developed by gambling operators to evade the $125 daily cap. One operator required that players who wished to collect their video poker winnings sign a trust agreement under which they would agree to hold the winnings in trust for themselves, and pay themselves $125 per day until the total winnings had been paid.[57] The language of this "trust agreement" revealed that even if the gambling operators were universally willing to risk criminal prosecution for violating the Video Game Machines Act of 1993, they at least had a sense of humor. To be sure there was no misunderstanding, the "trust agreement" read, in part:

> Although, at first glance, it might appear that the cash payment received by the undersigned exceeds One Hundred and

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[56] *See* Brad Warthen, *So Many Reasons to Ban Video Poker, I Don't Know Where to Stop*, THE STATE (Columbia, S.C.), Sept. 19, 1999, at A14.

> And our vaunted political system, the same that has dealt in such a careful and nuanced way with regulating alcohol, *has been rendered utterly incapable of dealing with video poker at ALL.* In 1998, a majority of legislators in both the House and the Senate co-sponsored legislation to ban video poker, but it was stopped by a handful of senators. Between the 1998 and 1999 sessions, video poker demonstrated its ability to control the outcome of elections with its vast wealth. Consequently, when lawmakers came back in 1999, they didn't even have the guts to keep in place and enforce the single most effective regulation for limiting video gambling—the $125 cap on winnings.

Id. (emphasis added).

[57] Order No. 68, *Johnson v. Collins Entm't Co.*, No. 3:97-2136-17 (S.C. Apr. 28, 1999).

> Twenty-Five Dollars ($125.00), in violation of the law, in fact, the undersigned hereby certifies and affirms that after first deducting the amount of the money he/she invested in order to obtain the cash payout referred to herein, the amount involved is, in fact, less than One Hundred Twenty-Five Dollars ($125.00). In the alternative, if in fact the amount received by the undersigned exceeds One Hundred Twenty-Five Dollars ($125.00), over and above the amount of his/her investment, the undersigned agrees to hold any excess money over and above that amount in trust, and to release it to himself/herself, periodically, at a rate not to exceed One Hundred and Twenty Five Dollars per day . . . [58]

The gambling operators needed to offer high potential winnings in order to stimulate large risk-taking by the general public, and they achieved this by a universal disregard for the law. Facts unearthed in the *Johnson* litigation show clearly that the video gambling operators realized that observance of the statutory winnings cap would destroy their business.[59] What the Video Game Machines Act of 1993 did for South Carolina was to legalize the receipt of cash in a limited amount from play on a licensed machine. The gambling operators then managed to collectively erect an iron wall around their operations by devoting unlimited legal resources to the defense of any legal claims made against them by individual players using antiquated remedies such as the Statute of Anne. On the public front, all they needed was for the state to refrain from any serious enforcement of the $125 payout limit. In this, they were not disappointed. What Senator Jack Lindsay accomplished with his dark-of-night amendment to the state's gambling laws paled in comparison to the value of an inert Department of Revenue (D.O.R.), the state agency charged with enforcing the $125 limit.[60] Since the D.O.R. refused to pursue any meaningful statutory remedy against the universal flaunting of the law, the cost of doing business was normally a very occasional $500 civil fine.[61]

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[58] Order No. 68, *Johnson v. Collins Entm't Co.*, No. 3:97-2136-17, at A-7 (S.C. Apr. 28, 1999).

[59] Dep. of Hugh Andrews, Aug. 12, 1998, J.A. 589-92, li. 21-64. All citations to depositions and affidavits are taken from the Joint Appendix in the appeal taken by defendants in *Collins Entm't Co. v. Johnson, supra* note 14. *See generally Johnson v. Collins Entm't Co.*, 199 F.3d 710 (4th Cir. 1999).

[60] The intransigence of the gambling operators in the face of mounting evi-

At this stage, it is interesting that the D.O.R. was headed by Burnet Maybank III who was appointed by Republican Governor David Beasley.[62] Only in late 1998 did the Republican Party move to an anti-gambling stance, after the multi-billion dollar industry was already established and powerful.[63]

Amazingly, the plaintiffs in *Johnson* initially gathered information about the standard operating practices of the owner/operators of video gambling machines by hiring a private investigator armed with a wrist-watch camera. The investigator, Mr. Bob Ray, visited locations in all forty-six counties in

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dence of universal violations of the State's gambling laws was remarkable. As *The State* newspaper of Columbia, South Carolina remarked on *Johnson v. Collins Entm't Co.*, the class action lawsuit calling for enforcement of the gambling laws: "This, essentially, is what the poker barons told Judge Anderson: 'Yes, we have ignored the law that says we can't pay winners more than $125 per day. But there's nothing you can do about it.'" Scoppe, *supra* note 41.

The D.O.R. started out with some serious law enforcement efforts after the passage of the VGMA in 1993. Immediately after the passage of the VGMA in 1993, the sitting Director of the Department of Revenue, Otis Rawl, began to enforce the law as written, meaning that no more than $125 could be paid out for play on a machine in any given twenty-four hour period. *Video Poker Distributors Threaten to Sue*, THE STATE (Columbia, S.C.), July 31, 1993, at 1B. Rawl said, "[I]f you're not going to comply, you do have to shut your doors." *Id.* However, the gambling industry was favored by later D.O.R. directors who steered clear of confrontation with the industry.

[61] First Amended Complaint, Johnson v. Collins Entm't Co., 508 S.E.2d 575 (S.C. 1998) (No.3:97-2136:17) (2 J.A. 547-48). In *Johnson*, Judge Anderson noted at a hearing that in the few cases where citations had been issued, the gambling operator always "paid the fine and walked away," rather than arguing that the excessive payouts were lawful. *Id.* at 596. The gambling operator's lawyer responded:

> That's correct. The reason being, it's a $500 fine. It doesn't seem probably to be worth it, unless there is a business which is . . . in the habit of exceeding payout limits, obviously isn't in their interest to pay an attorney probably in excess of $500 to litigate the case. It is just a practical matter.

Id.

[62] Lee Bandy, *Maybank to Guide Tax Agency,* THE STATE (Columbia, S.C.), Dec. 27, 1994, at B1.

[63] *See generally* Carroll & Pardue, *supra* note 41; Laurence Arnold, *Republican Urges Rebuff of Gambling*, THE STATE (Columbia, S.C.), Jan. 12, 1999, at A6.

South Carolina, and collected photographs and extensive written records depicting the operation of thousands of video machines.[64] The result was a voluminous notebook that portrayed the advertisements and visual displays accompanying each photographed machine and depicted incidents of its operation.[65] *Not one* "Pot-O-Gold" machine was found that complied with the state's $125 per day winning limit.[66] The state D.O.R., charged with enforcing this law, could have conducted the same investigation and made literally thousands of cases based on this clear consumer protection feature in the Video Game Machines Act. The director of this agency, however, unapologetically neglected to do so. A new director was appointed in 1999 after the democrats won the governor's mansion.[67] The plaintiffs' attorneys in *Johnson* then offered to give the D.O.R. the voluminous evidence of the state-wide violations of the law. This offer was declined even though the quarterly reports required by the VGMA to be filed with D.O.R. showed that the gross take for state-wide video gambling passed the billion dollar mark.[68] In 1998, gambling operators spent a record $700,000 on lobbyists in efforts to protect the gambling industry against growing public hostility.[69]

This in no way is meant to suggest any impropriety on the part of the D.O.R. or its personnel. Still, the new administration at the D.O.R. almost immediately began to offer a new and improved form of civil service to the gambling industry itself. Two intertwined issues in the *Johnson* case were (i) whether or not the $125 cap in VGMA was ambiguous, and if it was not, (ii) could the criminal penalties be pursued by the D.O.R. for wilful violations of the law?[70] Immediately prior to a critical hearing in the federal district court where these issues would once again be addressed, the D.O.R. proved just how responsive a government agency could be to a taxpaying citizen. At 10:02 a.m. on the morning of March 3, 1999, an attorney for one of the state's larger gambling operators delivered a written request for a "private letter ruling" from the D.O.R. Immediately, the staff member to whom this request was sent was directed by the D.O.R.'s newly appointed director to make it his highest priority. He was expressly told to "get out" this ruling immediately.[71] In fact, the staff member to whom the request was assigned, John McCormack, acknowledged that he had already been told to expect such a request.[72] Within approximately three hours, the staff member had drafted an opinion letter stating that it was the D.O.R.'s "longstanding position" that criminal sanctions under the VGMA were uncalled for.[73] The law, it seems, was just too ambiguous to support such a drastic penalty. On May 5, 1999, Mr. McCormack faxed a copy of the draft of his preliminary ruling to the gambling operator who had requested it. He had gotten a call earlier in the day from the D.O.R. director to make sure he was not delaying. Mr. McCormack also sent a copy to the chairman of the state democratic party, Dick Harpootlian, who was one of the primary defense counsel in the *Johnson* case.

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[64] Aff. of Robert C. Ray, Johnson v. Collins Entm't Co., 508 S.E. 2d 757 (S.C. 1998) (No. 3:97-2136:17) (1 J.A. 263).

[65] Aff. of Robert C. Ray, Johnson v. Collins Entm't Co., 508 S.E. 2d at 757 (No. 3:97-2136:17) (1 J.A. 263).

[66] *Id.*

[67] Chuck Crumbo, *Hodges Filling Cabinet*, THE STATE (Columbia, S.C.), Jan. 8, 1999, at A1.

[68] *See Groups Backing Video Poker Bet on Power of Purse*, THE STATE (Columbia, S.C.), May 13, 1991, at 1B.

[69] Douglas Pardue, *Gambling Lobbyists' Tab: $380,000*, THE STATE (Columbia, S.C.), Apr. 13, 1999, at B1.

Unfortunately for the gambling interests, part of Mr. McCormack's draft said that the $125 payment cap meant what it said. The gambling operator who requested the ruling faxed Mr. McCormack at D.O.R. this message: "I do not agree with the discussion of the interpretation," referring to the comments on the $125 cap in the draft.[74] One hour and forty-four minutes later, McCormack discussed the comments of the gambling operator with the D.O.R. director and changes were made to the draft. Two days later, Ruling No. 99-7 was issued without the offensive suggestions about the meaning of the $125 cap.[75]

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[70] Johnson v. Collins Entm't Co., 88 F. Supp. 2d 49, 507 (C.S.C. 1999)

[71] The staff member testified that this was the only such request he had ever received from the director. Dep. of John P. McCormick, at 36, ll. 3-19; at 37 ll. 16-19; at 38, l. 14; at 40, l. 9 (C.A. No. 3:97-2136-17) (Apr. 12, 1999).

[72] Cindi Ross Scoppe, *Here's How Quickly Revenue Moved on Video Poker Ruling*, THE STATE (COLUMBIA, S.C.), Apr. 18, 1999, at A11 (C.A. No. 3:97-2136-17) (Apr. 12, 1999).

[73] Dep. of John P. McCormick, at 20, ll. 19-25 (C.A. No. 3:97-2136-17) (Apr. 12, 1999).

[74] *Id.* at 41, ll. 8-25; at 42, ll. 2-10.

Ambiguity seemed to become a central concern overnight for state officials charged with enforcing the gambling laws. On August 24, 1998, Attorney General Charlie Condon abruptly informed the district court by letter that he did not wish to seek any ruling on the $125 winnings cap, which he had, after much consideration, come to view as "ambiguous."[76]

The state judicial system at the time had proven to be equally uninterested in gambling issues. In *Johnson*, the federal district judge, Joe Anderson, certified the question of whether or not the operation of video poker machines violated the state's constitutional ban on lotteries.[77] In a 3-2 decision, the South Carolina Supreme Court adopted a narrow definition of lotteries describing a lottery as "a gambling game . . . in which a large number of tickets are sold and a drawing is held for certain prizes."[78] To be fair, the South Carolina Supreme

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[75] In fact, the D.O.R.'s 1993 guidelines for the operation of the newly legalized video gambling machines expressly listed a "progressive jackpot" and "coupons for free credits or games" as "inducements" which could warrant criminal penalties if they exceeded the law. *See* SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION, A GUIDE TO CONDUCTING VIDEO GAMING ESTABLISHMENTS IN SOUTH CAROLINA 4 (1993). The D.O.R. at least initially did not find the VGMA so "ambiguous" as they did by 1999. *Id.*

[76] First Amended Complaint, Johnson v. Collins Entm't Co., 508 S.E.2d 575 (S.C. 1998) (No.3:97-2136:17).

[77] *Johnson*, 88 F. Supp. 2d at 502. *See infra* Section II. It will be indisputably clear that the term "lottery" in both English and American law was a generic one signifying any offer of a chance for a prize upon the payment of consideration for the chance. No particular form, such as the sale of printed tickets and a drawing, was required.

[78] Johnson v. Collins Entm't Co., 508 S.E.2d 575, 579 (S.C. 1998). The dissenting opinions of Justice Burnett and Chief Justice Toal are worth reading. *Id.* at 580 (Burnett, J., dissenting); *id* at 588 (Toal, J., dissenting). Arguably, the court *sub silentio* overturned its 1939 opinion that a lottery consisted of a transaction where a chance for a prize was offered for consideration. *Darlington Theaters, Inc. v. Coker*, 2 S.E.2d 782, 786 (S.C. 1939). However, other cases have drawn a distinction between lotteries and other games of chance in order to narrow the sweeping breadth of the classical three-part definition of a lottery (consideration, chance and prize). *See* Poppen v. Walker, 520 N.W.2d 238, 244-45 (S.D. 1994); Lee v. City of Miami, 163 So. 486, 490 (Fla. 1935); *see also* Eisenrauch,

Court has traditionally (and justifiably) been reluctant to involve itself in legislative matters, and gambling had become the hottest single legislative issue by 1998. Amazingly, the video gambling operators previously had *themselves* defended against suits to collect gambling winnings by arguing that these games constituted an illegal lottery under South Carolina law, and thus could give rise to no legal obligation to pay gambling winnings.[79]

The *Johnson* case thereafter continued on in federal district court under the RICO and Unfair Trade Practices claims. The disclosures made possible largely by this case changed the legal and political climate in South Carolina during the two years following the supreme court's 1998 ruling on the certified lottery issue.

Also, in early 1998, the incumbent republican governor of the state, David Beasley, joined the growing public reaction against wide-open gambling by declaring it to be a "cancer" that his administration would fight.[80] At this point, the swelling tills of the gambling operators were opened to his democratic rival, Jim Hodges, prior to the 1998 election.[81] Beasley's

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supra note 9, at 67-72. The South Carolina Constitution also contains separate references to "lotteries" (S.C. CONST. art. XVII, § 7) and "games of chance" (S.C. CONST. art. XVII, § 8), supporting the argument that the term "lottery" was not intended to be all-inclusive. However, as we shall see, this narrow approach is inconsistent with the vast weight of Anglo-American authority since the late seventeenth century.

[79] Bagwell v. Tollison, No. 91-CP-04-1784 (Ct. Comm. Pl. Anderson County Apr. 13, 1992); Amended Order (Aug. 24, 1993). Here the state circuit court held the claim unenforceable because of the constitution's lottery prohibition. Then came *Montjoy v. One Stop Abbeville, Inc.*, 478 S.E.2d. 683, 684 (S.C. 1996), and *Ardis v. Ward*, 467 S.E.2d 742, 745 (S.C. 1996), where the Supreme Court sustained recovery under the Statute of Anne, and did not reach the lottery question.

[80] Michael Sponhour, *S.C. Poker Surpasses GA. Lottery*, THE STATE (Columbia, S.C.), Apr. 25, 1998, at A1.

[81] There was an attempt in the 1996-97 legislative session to amend S.C. CODE ANN. § 12-21-2791 (2000) to allow payouts up to $125 "over and above the amount deposited" in the machines. This actually passed both houses of the legislature but was vetoed by then Governor David Beasley because the legislation "opens the door" for unlimited poker payouts. S.B. 207, 1997 Reg. Session (S.C. 1997); Governor's Veto Message to the Speaker of the House, June 17, 1997, Veto 19. The veto was sustained by the house by a vote of 90 to 15.

administration had been inactive on gambling issues until the enormously powerful, newly spawned gambling industry began to ally itself with Beasley's democratic opponent, Hodges. When Beasley formally declared war against video gambling, the video operators waged an all-out war against him. An estimated and unprecedented $3 million dollars was poured by gambling operators into Hodges' campaign.[82] Jim Hodges, a former member of the General Assembly, was widely known as video gambling's most vocal critic in previous years, but he underwent a remarkable "conversion."[83] Early in his gubernatorial campaign, Hodges reportedly met the state's largest gambling operator, Fred Collins, at a meeting of the Coin Operator's Association, a gambling operator's trade group.[84] Collins had come to the meeting with the intent of supporting a rival republican candidate, Sheriff James Metts, who sought the republican nomination against Beasley.[85] According to Collins, instead he ran into Jim Hodges, also a speaker at the meeting, and Hodges agreed not to oppose gambling in return for Collins' support.[86] Thereafter, in February 1999, the South Carolina House passed a bill banning video gambling which was only held off by the intervention of Senate Democratic Majority Leader John Land, who killed the bill in the Senate with a ten day filibuster.[87] There followed an unprecedented advertising and get-out-the-vote crusade for Hodges which was bankrolled by the gambling business. Hodges won.[88] As David Plotz, who covered the story for *Harper's Magazine*, summed up this amazing political story:

> It is a tale of how, in almost no time at all, a bunch of gas-station owners, jukebox operators, and barkeeps used law-

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[82] *See* Laurence Arnold, *Curb Gambling Cash in Politics Panel Says*, THE STATE (Columbia, S.C.) June 3, 1999, at A1.

[83] Cindi Ross Scoppe, *Is Jim Hodges a Friend of Video Poker? You Decide*, THE STATE (Columbia, S.C.), Aug. 11, 1998, at A10.

[84] Carroll & Pardue, *supra* note 41, at A9.

[85] Carroll & Pardue, *supra* note 41, at A9.

[86] Carroll & Pardue, *supra* note 41, at A9.

[87] Carroll & Pardue, *supra* note 41, at A9.

[88] *See generally* Joseph S. Stroud & Michael Sponhour, *S.C. Bets on Hodges*, THE STATE (Columbia, S.C.), Nov. 4, 1998, at A1.

> suits, strong-arm lobbying, dead-of-the-night legislation, and just plain deception to transform a small-time illegal gambling business into a multi-billion-dollar legal one; how these folks fought to increase regulation and taxation; and how, in the process of all this, they resurrected the state Democratic Party, battered the state legislature, wiggled out of campaign-finance restrictions, made common cause with white supremacists, and in a remarkable and demoralizing 1998 election, deposed one governor and bought themselves a new one.[89]

After the 1998 governor's election, it became obvious to all that the staggering overnight wealth of the video operators had translated into unprecedented political power. The legislature initially proved unable to slow down or regulate video gambling. Though the alliance of anti-gambling senators and the largely anti-gambling House had crafted a sensible regulatory measure—the $125 payout cap-as the price of legalizing video gambling, reasonable law enforcement of the cap had stalled through the administration of an inert D.O.R. Director during the republican administration lasting until 1998. Thereafter, enforcement lay dead in the water under a new pro-gambling democratic administration. An incredibly lucrative all-cash business with no state oversight or accounting, no special taxation and no meaningful enforcement of existing laws seemed politically unstoppable. After the 1998 gubernatorial election that put a democrat in the state House, a new director of D.O.R. was appointed. At that time, the South Carolina Law Enforcement Division (SLED), the agency charged with detecting violations of the VGMA had only six agents dedicated full time to enforcing the gambling laws.

In July of 1999, the state supreme court decided *Gentry v. Yonce,*[90] holding that the $125 cap was unambiguous.[91] For the first time, SLED had support from a federal district court and the state supreme court for the position that offering over $125 per day for play on video machines was illegal. SLED had begun to escalate the number and amount of citations given to gambling operators in 1998, but most of these cases involved failing to affix legally-required stickers to gambling machines indicating the machine's ownership and referred to state gambling laws.[92] SLED said that it "just doesn't have enough people to go out and make the difficult undercover cases . . ."[93] In any case, the operators' response was to appeal the vast majority of fines to the state's administrative law judge system.[94] Citations took approximately three weeks to reach the D.O.R., and it took approximately three months to get a case before an administrative law judge. Between July and October of 1999, SLED sent 440 citations to the D.O.R. totaling a potential of $1.7 million in fines.[95] By November of 1999, only three percent of the fines had been paid, with the remainder winding their way through the administrative law judge system and then presumably through the state court of appeals or the supreme court. Every day for the operators was a day of enormous profits since players put nearly $3 billion into video poker machines during the year ending June 30, 1999, and gambling machine operators paid fines at a rate of three cents on the dollar. Since existing law enforcement was not capable of responding to such massive violations of the law, and the D.O.R. was unwilling to launch or even suggest any new measures, the costs of violating the law remained low compared to the profits.[96]

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[89] David Plotz, *supra* note 55, at 64.

[90] 522 S.E.2d 137 (S.C. 1999).

[91] *Gentry*, 522 S.E.2d at 143.

At the apex of video poker supremacy, Judge Joseph F. Anderson, Jr., federal district judge for the District of South Carolina, issued a ruling that would become the first serious setback for the gambling operators in South Carolina. After issuing a preliminary ruling from the bench on April 19, 1999,[97] Judge Anderson followed on April 28, 1999, with a forty-five page order granting the plaintiffs partial summary judgment and equitable relief against eight of the gambling operator defendants.[98] Judge Anderson held that the $125 payout limit was not ambiguous and that the defendants who owned the machines and the locations where the machines were operated, and the defendants who leased the machines to others, knew that illegal payouts were routinely made.[99]

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[92] Michael Sponhour, *Minor Poker Infractions Cited Most*, THE STATE (Columbia, S.C.), Jan. 25, 1998, at A1.

[93] *Id.*

[94] *Id.*

[95] Clif LeBlanc, *Few Operators Paid State's '99 Poker Fines,* THE STATE (Columbia, S.C.), Nov. 5, 1999, at A1.

[96] *Id.*

[97] Johnson v. Collins Entm't Co., 88 F. Supp. 2d 499 (D.S.C. 1999). Judge Anderson noted the South Carolina Department of Revenue's non-enforcement of the

In holding that the defendants' acts amounted to an unfair trade practice under local law, Judge Anderson summed up the extraordinary breadth of defendants' willful violation of state law:

> The degree of repetition and thus "public impact" is extraordinary. The record suggests that these practices are engaged in by the defendants or others acting for the mutual benefit of the defendants and themselves. At best, they argue ignorance. Defendants offer nothing to counter the evidence that violation of the law is the routine practice. Indeed, the suggestion is not that the practices are infrequent but that they are so frequent, common, and pervasive in that no operator can compete in this industry without violating the law.[100]

$125 payout cap. *Johnson*, 88 F. Supp. 2d at 504.

[98] First Amended Complaint, Johnson v. Collins Entm't Co., 88 F. Supp. 2d at 499 (No. 3:97-2136:17); Mem. Op. Pl's Mot. Part. Summ. J., Johnson v. Collins Entm't Co., 88 F. Supp. 2d 499 (D.S.C. 1999).

[99] Mem. Op. Pl's Mot. Part. Summ. J. at 12-16, Johnson v. Collins Entm't Co., 88 F. Supp. 2d at 499. The court stated, "Only willful blindness would prevent actual knowledge." *Id.* at 516. The court also commented on the various stratagems the defendants used to create some appearance of legality, such as paying out winnings at a rate of $125 per day, or creating specious "trust agreements:"

> Moreover, and perhaps more importantly, the payment of cash in excess of the statutory cap in necessarily a violation of the public policy of this state as expressed in the state's statutes. The operators also engage in unethical behavior by devising a variety of schemes to evade detection of the violations. This includes any device which purports to make payments over a series of days, the payment of proxies or to players under names known by the operator to be false, the use of facially invalid "trust" agreements, or any other scheme to evade the limit or detection. These attempts at evasion are made more, not less, egregious by some of the defendants' attempts to shift blame to the payees. The latter is accomplished by encouraging the players to sign documents that the defendants cannot in good faith believe to be true or valid.

Id. at 518.

[100] *Id.*

The portion of the opinion dealing with equitable relief granted a permanent injunction against defendants to prevent their ongoing violations of state law and was based upon the federal district court's inherent equitable powers.[101] The public disclosures from this legal battle also helped to revive an unusual legislative compromise measure eventually isolating the gambling operators and enabled the state supreme court to deal them a final and lethal blow (discussed below).

In the meantime, there was a final court battle largely brought on by the defendants' efforts to evade the effects of Judge Anderson's ruling. On the defendants' appeal of Judge Anderson's ruling to the Fourth Circuit Court of Appeals, the defendants argued, among other things, that the *Burford* abstention doctrine should prohibit federal interference in an ostensibly state-controlled area of law.[102] Under the *Burford* doctrine, federal courts are to abstain from otherwise proper cases whenever some comprehensive state regulatory scheme is in place, and federal intervention into the regulated area would potentially disrupt the operation of that scheme.[103] The Fourth Circuit issued an order that stayed Judge Anderson's ruling granting the plaintiffs injunctive relief pending clarification by the South Carolina Supreme Court as to whether or not violations of the $125 payout cap could be considered a "special inducement" under state law, thus serving as a predicate act under RICO.[104] This determination naturally related to the defendants' *Burford* abstention arguments, since it would settle whether or not the federal district court's actions were harmonious with state law. Additionally, the theoretical (but so far unreal) existence of the state D.O.R.'s jurisdiction over the gambling industry under the Video Game Machines Act of 1993 was relevant to the defendants' *Burford* arguments. Two main issues controlled the fate of the *Johnson* case. First, had Judge Anderson been correct in reasoning that the state law on "special inducements" could support a RICO claim? Second, was there some meaningful state regulatory apparatus to which the federal courts should defer under *Burford*? Here, however, the state supreme court had carefully expressed its agreement with the federal court's interpretation of state law.

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[101] *Id.* at 520, 524.

[102] Johnson v. Collins Entm't Co., 199 F.3d 710, 715 (4th Cir. 1999)

[103] Burford v. Sun Oil, 319 U.S. 315 (1943).

[104] *Johnson*, 199 F.3d at 729.

The first shoe dropped with the state supreme court's clarification of state law in *Gentry v. Yonce*.[105] In *Gentry*, the court held that the $125 cap was unambiguous and that a violation could constitute a "special inducement" to gamble prohibited by the Video Game Machines Act, thus also serving as a RICO predicate act.[106] The court stated, "At this stage of the proceedings, we think that advertising or offering jackpots could be construed as a special inducement and thus support a RICO claim."[107] The court in *Gentry* also noted that the Fourth Circuit had stayed the effect of Judge Anderson's order in the *Johnson* case in favor of the plaintiffs pending a determination on the merits of the plaintiffs' claims which in turn called for a clarification of state law and added that they were in complete agreement with Judge Anderson, stating, "The order which granted permanent injunctive relief has been stayed by the Fourth Circuit Court of Appeals pending appeal of the injunction order on its merits. However, the District Court's ruling and analysis on the above issues is consistent with our opinion."[108] Judge Anderson was then in the unusual position of having an explicit statement of approval from the state's highest court on his interpretation of state law. In virtually every RICO case, a federal judge must determine, as best as he or she can, whether the facts alleged constitute a violation of state law sufficient to trigger the application of RICO, and simultaneous interaction between the federal and state judicial systems is rare outside of formal certification procedures.[109]

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[105] Gentry v. Yonce, 522 S.E.2d 137 (S.C. 1999).

[106] *Gentry*, 522 S.E.2d at 141.

[107] *Id.* at 142.

[108] *Id.* at 143 n.18 (citations omitted).

[109] *See generally* Steven T. Ieronimo, Note, *RICO: Is It a Panacea or a Bitter Pill for Labor Unions, Union Democracy and Collective Bargaining?*, 11 HOFSTRA LAB. L.J. 499, 513 n.101 (1994).

The second shoe dropped amidst a political storm that had been building anew around video gambling. The video gambling operators had been angling for some legislative relief from the legal attack on their empire begun by the *Johnson* case. They launched the state's most expensive lobbying campaign to date for a popular referendum on the issue of video gambling. The anti-gambling forces had reacted with a renewed push to outlaw video gambling altogether. By the summer of 1999, public opinion had clearly turned against South Carolina's gambling empire, and this enabled a broad-based and growing anti-gambling coalition and the anti-gambling forces in the legislature to exact a fateful statutory compromise with pro-gambling forces. The final legislative compromise passed the legislature and was signed into law on July 2, 1999.[110] Caught between the high-spending gambling operators and the increasingly outraged public, the state legislature became the gambling operators' only hope. In fact, the reluctance of pro-gambling legislators to overtly side with the gambling industry allowed the anti-gambling forces to fashion a "poison-pill" gambling statute, under which each side appeared to gain something. The South Carolina Senate contained sufficient anti-gambling members in 1998 to sustain a filibuster to any pro-gambling plan. Together with the anti-gambling majority House, the Senate was able to block any outright relief for the gambling operators who were feeling the escalating heat of Judge Anderson's enforcement of the $125 payment limit. This required the pro-gambling forces to gamble on some form of legislative relief to neutralize the *Johnson* lawsuit. With the anti-gambling minority in the Senate, led by Senator Wes Hayes, and the anti gambling majority in the House, led by Representative Terry Haskins, the operators were forced to compromise. Governor Hodges called a special session of the legislature which met on June 29, 1999, and which passed a new law completely revamping all prior gambling laws.

The new law contained six parts. Part I contained the main victory for the anti-gambling forces. It prohibited all video gambling payouts effective July 1, 2000. Part II, the concession to the gambling operators, called for a referendum to be held on November 2, 1999, to determine if voters wished to continue video gambling. The referendum question prescribed by the statute was, "Shall cash payouts for credits earned on video game machines continue to be allowed after June 30, 2000?"[111]

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[110] 1999 S.C. Acts 125. This unusual new statute was designed to replace the Video Game Machines Act of 1993 and its provisions reflected the bitter fight between pro- and anti-gambling forces.

Part I would take effect, banning video gambling altogether, only if the majority of voters said "no" to the referendum question required by Part II. In essence, the voters were given two different statutes and could choose the one they wanted.

If the referendum voters said "yes" to the referendum question, Part III provided for a substitute for the old Video Game Machines Act. The new law would allow payouts for video games to rise to $500 *per hand*, effectively ending limits on payouts altogether.[112] Part IV dealt with gambling losses and civil actions and Part V contained a severability clause, savings clause and intent section. Part VI specified the effective dates of the various sections depending on the voters' choice in the authorized referendum.

Part of the "poison pill" crafted by the anti-gambling coalition in the legislature was Part VI, Section 23(C) of the new law. This section stated that Section I, banning video gambling outright, would become effective on July 1, 2000. Coupled with the severability clause, this meant that if the authorized referendum failed or was for any reason found unconstitutional *and* the separate sections of the statute were severable, then gambling would be outlawed even without the referendum.[113]

The gambling operators launched another get-out-the-vote drive somewhat like the one they had used to get Jim Hodges elected governor, but were met by equally intense community resistance.[114] For reasons not fully known, one of the state's large video gambling operators, Joytime Distributors and Amusement Company, decided to challenge the new statute under the state supreme court's original jurisdiction.[115] Joytime, probably fearing that the referendum would not go in its favor, alleged that the new statute constituted an unconstitutional delegation of legislative authority to the people of South Carolina. Joytime argued that the referendum portion of the statute was unconstitutional thus so was the whole statute.

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[111] 1999 S.C. Acts 125, Part II, § 9(2).

[112] A single hand of video poker could be played in as little as twelve seconds. There was no limit under the new law on how many hands a player could play per day.

[113] Joytime Distribs. & Amusement Co. v. State, 528 S.E.2d 647, 654-55 (S.C. 1999).

[114] The Columbia, South Carolina newspaper, *The State,* noted the unprecedent-

What was at stake was nothing less than the whole video gambling industry.[116] If the gambling operators prevailed in the authorized referendum, video gambling would survive. If

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ed public reaction to the facts that had emerged about video gambling:

> The community is coming together in an unprecedented way, bridging partisan, racial, religious and social divides for the common good. The billboards are up, the state Chamber of Commerce is putting together an impressive media campaign. Every indication is that a majority of South Carolinians opposes video gambling.

Video Poker Will Win Unless Opponents Gear Up, THE STATE (Columbia, S.C.), Sept. 19, 1999, at D2. The gambling operators set up eight regional campaign headquarters around the state with 189 county coordinators. *Id.* These coordinators had command of over 856 "team leaders" who were themselves responsible for recruiting ten "vote captains" each. *Id.* Each of the 8,351 was responsible for registering non-registered favorable voters and getting at least fifty "yes" votes to the polls apiece. *Id.* A sophisticated state-wide phone bank was set up to determine where every registered voter in the state stood on this issue, and the organization was directed to contact anyone not adamantly opposed to video gambling directly or by phone or mail to persuade them to vote "yes." *Id.* A similarly energetic but much less extensive and well-financed opposition campaign drew together an unprecedented number of civic organizations, churches and businesses. *Id.*

Additionally, the state's largest video poker operator, Fred Collins, sued *The State*, which ran a series of editorials and columns outlining the abuses of the gambling industry. *Id.* Collins, represented by a leading pro-gambling member of the House, Jakie Moore, alleged that *The State*'s website included access to online gambling, even though the parent company had not notified *The State* about the contents of the ad since, by contract, they could place twenty percent of the local paper's website advertising. *Id.* When *The State* editorial board found out about the ads, it removed them from their website. *Collins Suit a Pathetic Attempt to Silence 'State,'* THE STATE (Columbia, S.C.), Sept. 22, 1999, at A14.

[115] *Joytime*, 528 S.E.2d at 649 (S.C. 1999).

[116] In *Joytime*, another of the state's largest video gambling operators, Pedroland, filed an amicus brief challenging Joytime's standing to sue. Brief Amicus Curiae of Pedroland, *Joytime*, 528 S.E.2d at 647. Pedroland is the creator of South of the Border on Interstate I-95 close to the North Carolina border. Pedroland's founder, Alan Schafer, had served time in federal prison for vote buying. *See supra* note 32 and accompanying text.

they lost, the new statute authorizing effectively unlimited payouts would not take effect. In that case, the new prohibition section would take effect. Only if they won the referendum or the whole statute were thrown out could the gambling operators return to business as usual under the 1993 act, which so far had literally no effect on their operations because of nonenforcement.[117] The solicitude that the gambling industry had received from the legislature might be running out, as evidenced by the unwillingness of the legislature to grant the industry outright relief from the inconvenient $125 cap in 1999. The *Johnson* case had fueled a growing public outcry against runaway gambling that made it politically possible for gambling opponents to throw the decision back to the people. Therefore, the matter was back where it had been in 1998, in the Supreme Court of South Carolina. Times had changed. In *Joytime Distributors and Amusement Co. v. South Carolina*, the supreme court held that the new statute violated the state constitution.[118] In a stunning blow to video gambling, the court also upheld the severability clause that preserved Part I of the statute, banning video gambling outright after July 1, 2000.[119] Thus, the referendum section of the new statute and the new VGMA that depended on it were thrown out, while the portion of the statute banning video gambling was sustained, because of the well-drafted severability clause.[120]

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[117] The state attorney general, Charlie Condon, a gubernatorial candidate in 2001, at first joined with the plaintiffs in the *Johnson* case, and then reversed his position, submitting a letter to the court supportive of the gambling industry. *See generally* Lisa Green & Michelle R. Davis, *No Raids, Condon Says*, THE STATE (Columbia, S.C.), Dec. 13, 1997, at A1.

[118] *Joytime*, 528 S.E.2d at 649.

[119] *Id.* at 650-51. The court based its decision on the fundamental principles of a republican constitution, stating:

> Article III, § 1 of the South Carolina Constitution states:
>
>> The legislative power of this State shall be vested in two distinct branches, the one to be styled the "Senate" and the other the "House of Representatives" and both together the "General Assembly of the State of South Carolina."
>
> In 1873, this Court was called upon to construe the two sections and stated . . .
>
>> *As the legislative power is granted in express terms importing a grant of general powers, such general powers of legislation cannot be regarded as reserved to the people* under this section.
>
> . . . .
>
> In a direct democracy, the people are given the power to legislate directly.

Not only was this the end of the line for the gambling operators in the state judicial system, it seemed to clear the way for the federal courts to finally reach the merits in the *Johnson* case. The substance of the plaintiffs' argument in *Johnson* was that, since the gambling machines upon which they had lost money were at all times illegally operated in a manner that violated the criminal laws of the state, then civil RICO provided a means to seek recovery. The supreme court in *Gentry* had expressed its approval of the federal district court's reading of state law, and the state regulatory apparatus that had theoretically been in charge of video gambling, the state Department of Revenue, was also out of the picture.[121] There could be no ongoing state regulatory process of an industry that no longer would exist after July 1, 2000.[122]

Nevertheless, the Fourth Circuit Court of Appeals became the gambling operators' last best hope. Approximately two months after the official notice of the demise of video gambling in South Carolina, hence the demise of any regulatory supervision with which federal intervention might interfere, the

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. . . .

> However, Article III, section 1, of the South Carolina Constitution provides for a representative form of government in this state as opposed to a direct democracy.

Id. (quoting S.C. CONST. art. III, § 1, and State v. Hayne, 4 S.C. 403, 421 (1873). Accordingly, the Court found that the legislature had abdicated its delegated power by allowing the people to choose which version of the statute they wanted. *Id.* at 652.

[120] In effect, anti-gambling forces in the legislature had forced the pro-gambling forces to accept a deal that blew up in their faces. There was to be no more possibility of a legislative reprieve, and Judge Anderson in the *Johnson* case loomed ever larger.

[121] Gentry v. Yonce, 522 S.E.2d 137, 144 n.18 (S.C. 1999).

[122] Additionally, the plaintiffs in *Johnson* filed a motion before the Fourth Circuit to withdraw their request for injunctive relief immediately before the supreme court's hearing in *Joytime*, since the supreme court's ruling on the new legislation would settle the fate of the video gambling industry, leaving plaintiffs to pursue their RICO and UTPA claims. Planitiffs'-Appelles' Motion for Leave to Withdraw Injunction, Johnson v. Collins Entm't Co., 199 F.3d 710 (4th Cir. 1999) (No. 98-2225). The Fourth Circuit denied Plaintiffs motion.

Fourth Circuit panel upheld the defendants' *Burford* abstention arguments as they applied to a request for injunctive relief that had been withdrawn and to a regulatory process that would soon cease to exist.[123] The panel held that the federal district court must exercise its discretion to refrain from interfering with a state regulatory system that, as to the subject of gambling, which would disappear on July 1, 2000.[124] Remarkably, the panel opined that:

> A state's interest in maintaining uniform regulation in an area of core state concern has long been a factor counseling abstention. Federal intrusions into state regulatory affairs may lead to "contradictory adjudications by the state and federal courts." Abstention enables the federal courts to respect state wishes to "prevent the confusion of multiple review of the same general issues." In superseding the enforcement efforts of DOR . . . with a detailed yet selective program of its own, the district court set itself up as an active participant in fashioning of state public policy. When the federal courts step uninvited into the shoes of state courts and state enforcement agencies, there exists a needless risk of tension between the two systems and conflicting mandates for those affected by state regulation.[125]

However, since the state supreme court had expressed its agreement on the use of the Video Game Machine Acts' $125 cap and anti-inducement provisions as RICO predicate acts,[126] the RICO claims in *Johnson* would appear to be unaffected by the panels' reversal of injunctive relief. Further, the immediate result of the *Joytime* ruling was the elimination of any state regulatory apparatus to which the federal courts might arguably defer under *Burford*.[127] Nevertheless, the Fourth Circuit panel decided not only to overrule Judge Anderson's grant of injunctive relief designed to enforce the state's gambling laws

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[123] Johnson v. Collins Entm't Co., 204 F.3d 573, 576-77 (4th Cir. 2000).

[124] *Johnson*, 204 F.3d at 576.

[125] Johnson v. Collins Entm't Co., 199 F.3d 710, 725 (4th Cir. 1999) (citations omitted), *reh'g denied*, 204 F.3d 573 (2000).

[126] *Gentry*, 522 S.E.2d at 143 n.18 (S.C. 1999).

[127] *See generally supra* notes 115-20 and accompanying text.

(the only enforcement to occur thus far), but also to "stay proceedings on claims for damages pending the resolution by the state courts of disputed questions of state law."[128] In the most curious part of the Fourth Circuit's opinion, not only was the injunctive relief overturned, but also further *legal* relief under civil RICO was stayed.[129]

This was indeed curious, since the central "disputed" question—whether the relevant state gambling laws could form the basis of a RICO action—had already been answered in *Gentry*. What other "questions" might there be? If the *Johnson* plaintiffs could no longer seek an answer to "disputed questions" (or even suggest what the "disputed questions" might be) in their case, in which voluminous discovery had already been completed and in which all relevant legal issues had already been joined, who could? How long should everyone be required to wait? Additionally, as to the "federal intrusion" into "core issues of state concern" that the panel in *Johnson* feared, it is noteworthy that RICO itself explicitly and clearly lists "gambling" as one of the subjects of federal regulation.[130] Moreover, the whole purpose of civil RICO is to engage the efforts of private plaintiffs in securing the enforcement of state policies when the supposedly responsible state officials fail or refuse to do so, something that had happened in South Carolina as in no other place since RICO was first passed in 1970.[131] Rather than subverting state policies, the *Johnson* case represented the first and only serious effort to support them.

This was all so peculiar, particularly the indefinite stay of the *Johnson* proceedings after the disappearance of any state regulatory scheme to which the federal courts might defer, that the plaintiffs requested a rehearing *en banc* from the Fourth Circuit.[132] The Fourth Circuit's response to this petition finally smoked out some of the mystery. After a request by a member of the court for a poll, four judges voted to grant a rehearing, four voted to deny, and three did not participate.[133] Judge Wilkinson wrote the opinion denying the rehearing, citing the "web of state regulation" that might otherwise be disrupted.[134] This prompted Judge Motz to let the cat out of the bag. Judge Motz remarked:

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[128] *Johnson*, 199 F.3d at 728.

[129] *Id.* at 727-29.

[130] Racketeer Influenced & Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961(1)(A), (1)(B) (2000) (listing 18 U.S.C. § 1955 as a predicate act statute).

[131] In fact, the Fourth Circuit was aware that the state D.O.R. was expressly relying on the private litigants in *Johnson* to clarify state law. *See supra* notes 67-68.

[132] Plaintiffs-Appellees' Petition for Rehearing, *Johnson v. Collins Entm't*

> A panel of this court has taken the dramatic, some would say bold, step of withdrawing our jurisdiction over an important set of cases in which federal rights are at stake. It has done so by way of an abstention principle, assertedly derived from the Supreme Court's *Burford* doctrine, but fundamentally of its own making . . . . I do not believe that the panel's decision squares with even the most expansive reading of the *Burford* doctrine . . . . Here, there was no interference of the sort that *Burford* recognizes, nor was there a comprehensive administrative scheme with which to interfere . . . . Here, by contrast, the district court was asked to decide a set of relatively straightforward state law questions: What is the meaning of the gaming statute's $125 payout limit? Would violation of that limit constitute "special inducement" or an unfair trade practice . . . . In *Gentry v. Yonce*, that court held that the $125 payout limit "states exactly what it means". I . . . myself doubt the wisdom of this contraction of federal court jurisdiction, and I question whether such a potentially sweeping change properly originates in our chambers.[135]

Judicial activism takes many forms, some of them far removed from the public eye. The Fourth Circuit judges who shielded the gambling operators from federal law did so on ostensibly "federalism" or "states' rights" grounds.[136] The

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*Co.,*199 F.3d 710 (Nos. 98-2225(L), 99-1601, 99-1709) (4th Cir. 1999).

[133] For some reason, the South Carolina members of the Court of Appeals for the Fourth Circuit declined to become involved.

[134] *Johnson*, 204 F.3d 573 (4th Cir. 2000).

[135] *Id.* at 577-80.

[136] Professor Robert Blakey, a principal author of RICO, remarked on the use of "federalism" in the manner exemplified by the Fourth Circuit:

> A variation of the *State Law Is Adequate* myth is the contention that federal litigation under RICO is inconsistent with federalism. In fact, RICO implements, not frustrates, federalism . . . . Federalism in this

United States Supreme Court by most accounts has recently taken a similar direction.[137] The Fourth Circuit is often described as the "most conservative" of the federal appellate circuits.[138] Yet their opinion in *Johnson* was clearly not "conservative" in any real sense. It did not "conserve" Congress's constitutional authority to regulate gambling activity conducted through an interstate enterprise, an authority it has expressly exercised in RICO and the predicate act statutes it incorporates. It did not "conserve" the autonomy of the federal district court in enforcing clearly constitutional federal law, an authority that can be challenged in this context only for

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> argument looks like a matter of principal, not principle. When elements opposed to RICO suggest that its subject matter be returned to the states, they really mean that it be enforced inadequately or not at all, as most state and local agencies lack the interest or expertise to do sophisticated organized or white-collar crime investigations or prosecutions, and state legal systems were primarily designed to deal with nineteenth century type crimes and torts. Similarly, when elements opposed to RICO suggest that its subject matter be enforced only or mainly criminally, they really mean that it be enforced inadequately or not at all. If our markets are free, it is not because of the work of public agencies enforcing the antitrust statutes, as important as they are. Private enforcement is, in fact, the linchpin of the antitrust statutes. When civil rights legislation was under consideration in the 1960s, many critics emphasized states' rights, which were then, at least for some, only a smoke screen behind which to hide a rotten system of segregation. Criticism of RICO based on federalism also looks like a smoke screen behind which the swindlers and others seek to hide. Accordingly, those who are opposed to RICO are working, wittingly or unwittingly, to free those who engage in organized or white-collar crime from the appropriate legal accountability.

G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform*, 43 VAN. L. REV. 851, 921-24 (1990) (emphasis added).

[137] *See generally* United States v. Morrison, 529 U.S. 598 (2000) (striking down a federal statute giving a civil remedy for gender-motivated violence as unsupportable under Congress' authority over interstate commerce or under the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549 (1995) (striking down the federal Gun-Free School Zones Act of 1990 as exceeding Congress' Commerce Clause authority). At least the Fourth Circuit appears consistent in its newfound solicitude for state authority. *See* S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165 (4th Cir. 2001) (holding that sovereign university presents a federal administrative tribunal from conducting proceedings instituted by a private party against a state-authorized entity).

[138] *See, e.g.*, Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1075 (2001).

abuse of discretion. It did not "conserve" any extant state regulatory or statutory scheme, since that had ceased to exist. Perhaps the Fourth Circuit thought it better to hold RICO in abeyance and "conserve" the opportunity of the state to create and adequately enforce some new regulatory scheme at some uncertain future date, despite its seven-year failure to enforce the unambiguous laws it already had—a sort of "two bites at the apple before RICO kicks in" approach. In fact, the only thing the Fourth Circuit's ban on further legal relief under RICO "conserved" was an extension of life for gambling business conducted in a manner that violated state law. Judicial policymaking restricting legitimate federal authority is no better than the reverse–judicial activism using historically and logically unsupportable expansions of federal constitutional theory to displace legitimate state authority. We have seen plenty of the latter, and it may be that we are destined to see plenty of the former. Yet startlingly novel alterations in the law are no more in keeping with legitimate judicial functions where they are driven by "conservative" motives than where they flow from "liberal" ones.[139]

The Fourth Circuit's protective blanket around gambling operators in South Carolina seemed pretty tight at first. An indefinite stay of the only fully-developed case on potential RICO liability, pending the prosecution and resolution of identical "disputed issues" in some possible future unrelated case seemed pretty sure to keep out the cold winds of RICO. The *Gentry* case afforded the possibility of some development of RICO issues, owing to the South Carolina Supreme Court's ruling that violations of the $125 payout cap could support RICO liability. However, *Gentry* came to an end with a jury verdict for the defendants on liability on March 2, 2001.[140] There was no appeal, and so no further analysis of the supreme court's original ruling on potential RICO liability. Since the fundamental rationale of the Fourth Circuit for staying the hand of the federal court was some undefined potential conflict with the state's laws, Judge Anderson thereafter took action in a way that made it hard for the Fourth Circuit to complain; he certified several questions to the South Carolina Supreme Court.[141] These questions were all-inclusive and should fully resolve all issues concerning the content of state law relevant to RICO liability, as well as potential liability under the state's Unfair Trade Practices Act.[142] The state supreme court accepted these questions on May 14, 2001, and heard arguments on December 11, 2001.[143] The issue of class certification in

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[139] The Fourth Circuit had previously adopted an impressionistic test for determining the existence of a RICO "pattern of racketeering activity" that would essentially make this issue discretionary with the court. The Fourth Circuit held that a determination of the "pattern" issue required a court to assess the "criminal dimension and degree" of a defendant's activities. Int'l Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 154-55 (4th Cir. 1987); *see* R. Bridwell & J.H. Cooper, *Hard Law and Bad Cases: The Fourth Circuit Limits Civil RICO*, 22 WAKE FOREST L. REV. 715 (1987).

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[140] Verdict Form, Gentry v. Rinehart, (No. 97-CP-41-165) (March 2, 2001).

[141] *See* Johnson v. Collins Entm't Co., 564 S.E.2d 653 (S.C. 2002).

[142] *See* S.C. CODE ANN. § 39-5-10 et seq. (1985).

[143] The relevant questions are:

> II.Would S.C. Code Ann. § 12-21-2804(B) (2000) be unconstitutional as applied, if construed to prohibit the offering of cash payouts in excess of $125?
>
> . . . .
>
> IV.Under the findings of fact set forth in the District Court's Memorandum Opinion on Plaintiffs' Motion for Partial Summary Judgment, entered April 28, 1999, in which the facts were viewed in the light most favorable to the defendants, is the defendants' conduct in offering or allowing to be offered, the payment of sums in excess of $125 for credits accumulated on a video gambling machine subject to prosecution under S.C. Code Ann. § 12-21-2804(F) as the unlawful offering of a special inducement to gamble as prohibited by Section 12-21-2804(B)?
>
> . . . .
>
> V.While the general operation of the devices at issue was authorized by law during all times at issue, and while South Carolina law generally exempts the operation of the devices at issue from statutory penalties under the state's criminal laws relating to gambling, would the activity alleged nonetheless become "a gambling business which is a violation of the law of [the] State" of South Carolina if defendants are proven to have routinely offered and made payouts in excess of that allowed by state law or to have created fraudulent records to disguise the making of such payouts?
>
> . . . .
>
> VI.Does the availability of a remedy under S.C. Code Ann. §§ 32-1-10 and 32-1-20 for certain gambling losses preclude plaintiffs from seeking recovery under other state law theories for: (a) losses which are compensable

Johnson remained open at this time.[144] On May 28, 2002, the South Carolina Supreme Court issued a sweeping unanimous opinion, authored by Chief Justice Toal.[145] The opinion answered every certified question in favor of the plaintiffs and is an excellent treatment of the linkage between state law and RICO in gambling cases.[146] Certified Question IV dealt with S.C. CODE ANN. §2804(B) and (F), which together make it a crime to offer any "special inducement" to gamble.[147] The supreme court treated "special" as the equivalent of "illegal."[148] Since it was clearly illegal to offer winnings in excess of $125 during a twenty-four hour period,[149] the defendants' universal practice of doing so was clearly illegal.[150] The problem that had proven troublesome was the use of a state criminal law—the prohibition—that arguably required some investigation of each plaintiff's state of mind.[151] Were plaintiffs in-

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> under these sections if timely filed; or (b) losses which would not be compensable under these sections regardless of the time of filing?
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> . . . .
>
> VII.Under the findings of fact set forth in the District Court's Memorandum Opinion on Plaintiffs Motion for Partial Summary Judgment, entered April 28, 1999, in which the facts were viewed in the light most favorable to the defendants, does the defendants' conduct constitute an unfair or deceptive act in the conduct of any trade or commerce, as a matter of law, under SCUTPA, S.C. Code Ann. § 39-5-10 *et seq.*?

Johnson, 564 S.E.2d at 659, 663-65.

[144] The district court initially denied the plaintiffs' motion for a plaintiffs' and a defendants' class on April 30, 2001. First Amended Complaint, Johnson v. Collins Entm't Co., (No.3:97-2136:17). Plaintiffs moved for reconsideration on May 10, 2001, leaving the issue unresolved as of the date of this writing. *Id.*

[145] *Johnson*, 564 S.E.2d at 653.

[146] *Id.*

[147] *Id.* at 663.

[148] *Id.* at 659 n.6.

[149] S.C. CODE ANN. § 12-21-2791 (2000) (repealed 2000).

[150] For a comprehensive discussion of RICO, see *infra* Section III. Briefly, the "special inducement" prohibition in S.C. CODE ANN. § 12-21-2804(B) was linked to the $125 payment cap, meaning that each offer to pay over $125 in winnings became a prohibited "special" (i.e., "illegal") inducement, potentially punishable by imprisonment for more than one year, thus qualifying as a RICO predicate act under RICO § 1961(1)(A). Also, by simply being unlawful and punishable criminally (without regard to length of imprisonment), this meant that RICO §1955, the Illegal Gambling Business Act, could be used to define RICO predicate acts (i.e., each offer of a "special inducement").

[151] S.C. CODE ANN. § 12-21-2804 (2000) (repealed 2000).

duced to a different degree by the illegal offer? If the joinder of the state law to RICO entailed such an individualized proof (somewhat like proving relevance in a fraud case) this could have created differing damages and factual issues peculiar to each plaintiff, making certification of a plaintiff class unlikely.

However, the supreme court's answer to Certified Question V provides a useful lesson on the manner in which RICO employs state law. The answer to the question was reminiscent of a line of criminal RICO cases in which defendants had been engaged in a licensed gambling business, but whose actions exceeded the scope of the actuality permitted by their license.[152] Does the possession of a legitimate business license generally authorizing a regulated activity—gambling—mean that such business should not be regarded as illegal for purposes of RICO? Or does the defendants' exceeding or deviating from particular regulations applicable to the licensed activity destroy the legality of the business itself? The South Carolina Supreme Court held the latter, creating a legal framework for legalized gambling that envisions a desert of illegality containing a small oasis of legality.[153] To stray from the oasis is fatal to the claim that the defendants' business is actually lawful because it is generally permitted by state law. The court stated succinctly:

> Even though video poker was a legal gambling business, it could *become* an illegal gambling business if it was operated in a manner which violated VGMA. Section 12-21-2710 makes gambling devices generally illegal, except for this video game machines "which meet the technical requirements provided for in section 12-21-2782 and 12-21-2783." Therefore, if the video poker business did not fall with in express license of the law, it would *not* be "a legal gambling business." If a person operated his video poker machines in violation of the limits set forth in VGMA, and if those violations carried criminal penalties under South Carolina law, then that person has conducted an "illegal gambling business . . . [in] violation of

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[152] *See infra* Section III.

[153] *Johnson*, 564 S.E.2d at 663-64.

the law of [South Carolina]."[154]

For both state law and RICO, this means that any licensed gambling operator who does not stick to the letter of the law and conduct his business precisely as permitted by that letter forfeits his claim to legality. Every single act conducted beyond the law brings such a defendant under the full force of any applicable criminal penalty. Significantly, for a class action, this statute clearly requires no individualized proof dealing with a plaintiff's elusive state of mind. All losses on illegally operated machines are unlawful, and all losses are proximately caused by the defendant's unlawful acts. We will argue that such subjective considerations as state of mind or "inducement" are out of place in RICO jurisprudence and that outside of mail and wire fraud, should never be employed. In any case, a *per se* violation, such as exceeding licensed authority, carries with it no such problems and provides issues of law and fact, which should ensure that the other requirements of Rule 23 are met.

The South Carolina Supreme Court's ruling should end the *Johnson* saga once and for all. The supreme court's resolution of these questions will be one of the single most significant factors in the ongoing spread of gambling in America, and the future of civil RICO in the area of gambling will likely be heavily influenced by it.

The South Carolina experience reveals how extensive the legal war to combat unlawful gambling must be in the absence of resolute legislative and regulatory action by the state. In South Carolina, the tactical maneuvering by the gambling operators began by removing a state lawsuit into federal court.[155] Following a loss at the district court level, the operators argued that the federal court had, after all, trespassed into an essentially state domain.[156] A federal court of appeals thereafter nullified the application of RICO to an area–gambling–expressly specified by Congress as a subject of federal regulation, ignored the express approval of the state supreme court for what the federal district court had done, involved a federalism principle applicable to a state of facts that did not exist, and halted the district court's future consideration of legal issues that were not even involved in the appeal.[157] Rather than take the easy way out and just back away, the district court engaged a willing state supreme court in the consideration of certified questions encompassing every conceivable state law issue relevant to the RICO claims before the court. All this occurred while a political and constitutional battle became the near-exclusive preoccupation of the legislature, the governor and eventually the state supreme court, finally culminating in the complete destruction of the gambling industry. A rogue business with enormous financial resources, completely dedicated to funding a political and legal duel to the death is precisely what the federal RICO statute was designed to combat.

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[154] *Id.* at 664.

[155] *See supra* note 15 and accompanying text.

[156] *See supra* notes 102-03 and accompanying text.

The banning of video gambling in South Carolina amounted to "the largest shutdown of legalized gambling in U.S. history."[158] In response, South Carolina's gambling operators large-

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[157] *See supra* note 104 and accompanying text.

[158] Karen Cimino, *S.C. Video Poker Ban Drives Enthusiasts North*, THE STATE (Columbia, S.C.), Aug. 19, 2001, at A1. There has been a judicial and legislative battle over "cruises to nowhere" similar to that over video poker. In a "cruise to nowhere," a gambling ship leaves the state's territorial waters before allowing gambling activities, seeking legitimacy under the Johnson Act, 15 U.S.C. § 1175 (2000), which establishes the lawfulness of

> the *transport or possession*, on a voyage, of a gambling device on a vessel that is within the boundaries of any State or possession of the United States if *use* of the gambling device *on a* portion of that voyage is . . . not a violation of this section[] and the gambling device remains on board that vessel while the vessel *is within the boundaries of that State*.

15 U.S.C. § 1175 (b)(1)(B) (2000) (emphasis added). The Fourth Circuit has ruled that the Johnson Act does not create a preemptive federal right to operate "cruises to nowhere," and that the state can still ban casino boats from its ports. Casino Ventures v. Stewart, 183 F.3d 307, 312 (4th Cir. 1999). The pattern that typified the video poker conflict in the state legislature has carried over to the casino boat issue–the House attempting to ban and the Senate successfully stalling. One operator, Sun Cruz Casinos, continued to operate a casino boat from Little River, South Carolina, despite the expense of lawsuits and lobbying necessary to fight the Fourth Circuit's ruling in *Casino Ventures*. *Director Files for Chapter 11 Protection*, THE SUN NEWS (Myrtle Beach, S.C.), June 25, 2001 at G2. As the controversy over the Sun Cruz vessel developed, the company's founder was killed in a gang-style

ly moved *en masse* to other states, where, even though video gambling payouts are illegal, they began to thrive anew.

Outlawed video poker machines began to roll out of South Carolina into Georgia and North Carolina. Learning very quickly from South Carolina's lesson, the Georgia legislature moved swiftly and resolutely to ban video gambling outright. The Georgia Senate unanimously adopted a previously-passed House bill on September 7, 2001.[159] The bill was signed into law on September 15, 2001.[160]

The North Carolina legislature opted for a half-way measure. Under a new law signed into effect on August 2, 2000, only machines already in North Carolina were declared legal.[161] These must be licensed and can only make "payouts" in the form of coupons redeemable for ten dollars worth of merchandise.[162] Local sheriff's departments administer the regulations and enforce the new law, which punishes a first offense violation as a misdemeanor, the second as a felony.[163] An esti-

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shooting outside his office in Ft. Lauderdale, Florida. *Id.* The company's new director reportedly issued over $30,000 in company checks to a Gambino mob associate, creating more negative publicity for the casino boat business. *Id.* Meanwhile, the South Carolina Supreme Court held that the casino boat operators were not currently violating any state law. Stardancer Casino, Inc. v. Stewart, 556 S.E.2d 357, 361 (S.C. 2001). The battle between the South Carolina House and Senate to ban casino boats continues.

[159] Cimino, *supra* note 158.

[160] S.B. 7EX2, 2000 Gen. Assem., Spec. Sess. (Ga. 2001), *available at* http://www.legis.state.ga.us/legis/2001_ss/fulltext/sb7ex2.html; www.ganet.org. An estimated 20,000 machines had cranked up in Georgia pulling in estimated revenues of over $1 billion. *See* Dahleen Glanton, *South Is Out to Deal Blow to Video Poker*, CHI. TRIB., March 25, 2002, at 1. Predictably, gambling machine operators quickly obtained an injunction against enforcement of the ban from a Fulton County Superior Court Judge, who found the banning of gambling machines "a real threat to liberty," and held the Georgia statute to be overbroad. Phoenix Amusement Inc. v. Barnes, *available at* http://www.accessatlanta.com/ajc/metro/legislature/videopokertext.html. The Georgia Supreme Court reversed, and upheld the statutory ban on all video gambling. Georgia v. Old South Amusements, Inc., 564 S.E.2d 710, 715 (Ga. 2002).

[161] N.C. GEN. STAT. § 14-306.1(a) (2001); *see also* Beth Velliquette, *Gaming Machines Must Be Registered*, CHAPEL HILL HEARLD, Sept. 11, 2000, at (discussing N.C. GEN. STAT. § 14-306.1(a)).

[162] N.C. GEN. STAT. § 14-306(b)(2) (2001).

[163] Beth Velliquette, *Poker Machines Dumped, Crushed*, CHAPEL HILL HERALD, Mar. 1, 2001, at 1.

mated 10,000 machines moved from South Carolina to North Carolina and, predictably, the gambling operators in North Carolina followed the South Carolina pattern by ignoring the law.[164]

In the first three months of 2001, some $4.2 million was put into machines in Cleveland, Mecklenburg and Gaston Counties, all of which border South Carolina.[165] Illegal cash awards of up to $2000 are reportedly rampant, and the state sheriffs have received no new funding to handle this problem.[166] Video gambling earnings are predicted by the department of revenue to exceed $100 million yearly.[167]

A new pro-gambling governor, Mike Easley, is pushing hard for a state-run lottery. Governor Easley has brought Georgia lottery officials to North Carolina to talk up the lottery and is pushing the legislature to authorize a referendum on the lottery.[168] Meanwhile, sheriff's deputies have begun destroying illegal video poker machines.[169] Under the law enacted by the 2000 session of the North Carolina General Assembly, video poker machines were said to be "tightly regulated" but not banned outright.[170] Sound familiar? The North Carolina statute's "grandfather" clause legalized machines already in North Carolina on the statute's effective date, but required such machines to be registered on the tax rolls at an even earlier date, thereby creating an *ex post facto* issue as to some machine owners.[171] The machine owners sued, and the federal district court struck down the statute,[172] throwing the whole mess back to the legislature. The district court noted that the North Carolina statute was passed because "lawmakers foresaw a migration in the summer of 2000 of video gaming machines from South Carolina."[173] The gambling machines cranked up again, and the "tight" regulations do not seem to be working any better than they did in South Carolina.

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[164] *Gambling Devices Banned in S.C. Hauled North*, HERALD SUN (Durham, N.C.), Aug. 20, 2001, at B3.

[165] The legislature of North Carolina considered banning the transportation of new video machines into the state, but the proposed ban failed. Cimino, *supra* note 158. Instead, the machines have to be registered with the local county sheriff's office. Cimino, *supra* note 158. Predictably, the sheriffs have been overwhelmed. Cimino, *supra* note 158.

[166] *Id. See* John Hechinger & John Reinen, *Video Gambling Addicts Loose Savings, Shatter Lives*, THE CHARLOTTE OBSERVER, June 9, 1997; John Reinen, *Pulled Apart*, THE CHARLOTTE OBSERVER, June 9, 1997 at 1E.

[167] *See* Paul T. O'Conner, *To Cure Budget Woes, Poker, Not Lottery, Might Be Safer Bet*, WINSTON-SALEM J., Aug. 5, 2001 ("The N.C. Department of Revenue has learned that the 9,000 legal video poker machines operating in the state may be generating more than $100 million in sales yearly . . . ").

[168] Gary D. Robertson, *Easley's Persistance Pays Off On Learning*, THE HERALD-SUN (Durham, N.C.), Sept. 24, 2002, at C5.

[169] *See* Velliquette, *supra* note 163.

[170] *See* O'Conner, *supra* note 167.

Senator Wes Hayes of South Carolina, the chief architect of video poker's defeat in the South Carolina Senate, has another view that North Carolina should consider. Senator Hayes said, "If the machines are there, no matter what kind or how much restriction they are under, they will be used for gambling. Period."[174]

The move to North Carolina illustrates the gambling operators' classic opening gambit, one that proved immensely profitable in South Carolina: begin with complete disregard for the law, and use all possible political influence to lodge primary law enforcement responsibility in a state agency that can be effectively neutralized or stalled indefinitely; make sure that the penalty for violating the law is so insignificant that enforcement is so infrequent that a policy of intentional violation is cost effective; insure that the immediate enforcement of the law is placed in the hands of overworked and understaffed officers that will simply be unable to cope with the avalanche of illegal gambling; employ sophisticated portable video technology that can turn every gas station, convenience store and saloon into one giant state-wide casino;[175] concentrate heavy financial

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[171] *See generally supra* notes 161-62 and accompanying text.

[172] Helton v. Good, 208 F. Supp. 2d 597, 608 (W.D. N.C. 2002).

[173] Henderson Amusement, Inc. v. Good, 172 F. Supp. 2d 751, 754 (W.D. N.C. 2001).

[174] Interview with Wes Hayes, South Carolina Senator (Sept. 26, 2001) (on file with author).

[175] *Illegal Use of Video Gambling Machines: Hearing Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs,* 98th Cong. 1 (1984) (statement of Senator Roth, Chairman, Sen. Subcomm. on Investigations of the Comm. On Govt. Affairs):

> I think as the machines we have here today demonstrate, high technology

support at the top of whichever political party will advocate the cause of gambling. The result is a gambling operator's paradise: a legislature where the foes of gambling are largely neutralized,[176] a regulatory branch of government appointed by a favorable political administration, which uses its regulatory powers, to put it mildly, in a manner not unhelpful to the gambling promoters, and a law enforcement branch physically and logistically incapable of responding to lawbreaking on a vast scale. This gave the gambling business in South Carolina seven fat years. The next fat years are slated for North Carolina or any other state where this pattern can be successfully repeated.

The really interesting question now is, with the South Carolina experience in mind, will the officials of North Carolina and other states go down the same road? The real force driving this issue is money, and how it translates into political influence. For the student of federalism and separation of powers, it is worth noting that, in South Carolina, no amount of law on the books could take the place of one courageous federal judge, a state supreme court willing to stand apart from the currents of politics in order to enforce the law and a determined minority in the state senate determined to resist the biggest lobbying effort in the history of the state.

> has moved into still another aspect of American life; that is, illegal gambling. These video poker machines, and other games, illustrating what we are talking about, lend themselves to gambling and, in all candor, are increasingly finding their ways into bars, truck stops, video arcades, fraternal organizations, convenience stores, and other businesses.

It is part of the genius of video gambling that, unlike conventional high-stakes gambling involving a small number of extremely wealthy players, and thus requiring a huge capital investment for a lavish playing environment, video gambling takes advantage of an existing infrastructure, such as the normally small but widely dispersed locations where machines are placed for use. *See* Christina Binkley, *In Las Vegas, Casinos Take a Big Gamble on the Highest Rollers*, WALL ST. J., Sept. 7, 2001, at A1. Unlike the large casinos offering high-stakes games like baccarat to high-rollers who may lose big (known as "whales" in the gambling industry), the video machine operator does not need to cultivate particular players whose limited but lucrative business is critical to a sophisticated casino's balance sheet. The video gambling operator just plugs in the machine, and nature takes its course. The video gambling operator nets a million mullet for every "whale" taken at the Bellagio or Ceasar's Palace in Las Vegas.

[176] To the South Carolina Legislature's credit, they did at least initially pass the $125 payout cap.

II. THE LAW

A. The Evolution of the English and American Law of Gaming and Lotteries

1. The English Law

The South Carolina experience provides a dramatic snapshot of the manner in which gambling interests maneuver their way through modern law and politics. To evaluate the response of South Carolina's legal and political system to gambling's abrupt arrival, eventual dominance and final defeat, it is useful to take a longer look at exactly what gambling is. Probably no society has ever created a better historical record than that found in the English legal system and its modern heirs. A well-recorded common law process has been building since the thirteenth century, and this evolution was finally joined by a representative legislative system, whose existence was finally secured for good in the seventeenth century. From the records of this political and legal evolution spanning over 600 years, we have a wonderful record of how society dealt with its serious issues and problems, including those relating to gambling.

Virtually everyone has an understanding of what gambling is, though few could articulate a precise definition of it. Additionally, almost everyone has some familiarity with familiar forms of gambling, though few could give a precise definition that distinguishes one type of gambling from another. Over the course of several centuries, English and American jurisprudence has developed some relatively precise definitions of gambling and its stereotypical forms. Familiar popular terms include "gaming," "wagering," "betting" and "lottery." All refer to gambling, but how does each form differ?

In the early period of English law, from the thirteenth to the seventeenth century, laws dealing with activity that we would classify as "gambling" today were aimed at abuses involving games or sports, hence the term "gaming" is used in connection with gambling. The definitive edition of the *Encyclopaedia Britannica*, the Eleventh Edition of 1910-11, describes "gaming" and "wagering" as having a similar meaning: "It is somewhat difficult exactly to define or adequately distinguish these terms of allied meaning."[177] The author of this entry describes how the word "game" was traditionally applied to pastimes and sports, and how a variety of abuses connected with such pastimes and sports led to regulation aimed at ridding the practice of sports of the abuses, rather than at proscribing or generally regulating what we would now call "gambling" or "games of chance."[178] In other words, the first appearance of legal measures aimed at "gambling" was in the context of particular games or sports which had become an occasion for collateral wagering or betting.[179] Additionally, spending a large amount of time playing certain games was considered a hindrance to the performance of work or public duties.[180]

For a variety of reasons, either the playing of certain sports or the betting or wagering on them was deemed to pose a threat to the public weal during the middle ages. For example, under early English common law, no games were themselves unlawful, and hence there was no *per se* rule against betting on games.[181] Early on, the only time the law would intervene was when the sporting events or amusements, which may or may not be connected with wagering, became disorderly and constituted a public nuisance, or interfered with some public goal, such as national defense.[182] The policy of prevent-

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[177] Hugh Chisholm, 11 ENCYCLOPAEDIA BRITANNICA 446 (11th ed. 1910). This is the so-called "scholar's edition" of *Britannica*, and constitutes one of the finest research tools produced in the twentieth century.

[178] *Id.*

[179] *See id.*

[180] *Id.*

[181] *Id.*

[182] The *Encyclopaedia Britannica* describes the public policies which historically invoked some regulation of games:

> Several points of view have been taken: (1) their competition with military exercises and training; (2) their attraction to workmen and servants, as drawing them from work to play; (3) their interference with the observance of Sunday; (4) their combination with betting and gambling as causing impoverishment and dishonesty in children, servants and other unwary persons; (5) the use of fraud and deceit in connection with them.

Id.

As the example above makes clear, rules dealing with wagering or chance originally appeared in English law as a sub-category to public regulation of sports ing impoverishment of the general and unwary public through the taking of risks on sports or games eventually led Parliament to develop a more precise definition of the operative principles of gambling itself.[183] The distinct elements of gambling, and the human behavioral characteristics it revealed, were realized only when gambling became conceptually separated from the pastimes that gave rise to it.

In tracing the evolution of separate gambling rules in English law, it is important to note that the legislation directed at gambling assumed a variety of forms over time, each form directed at the manifestation of the gambling activity deemed by Parliament to be particularly prevalent at any given time, or to be insufficiently regulated by existing law. As will become evident, each form of anti-gambling legislation was directed at the same underlying problem, though it required several centuries for the English courts and Parliament to conceptualize just what that problem was. Eventually, the underlying problem in all gambling became conceptualized as the offering of rewards for risk—the risk of money or property on an issue of chance.[184] Only when this separation occurred, in the late seventeenth century, did it become possible to shift the focus of analysis from the sport or game giving rise to gambling to the psychology of gambling itself.

Over several centuries, the English courts came to view the particular form gambling assumed as unimportant, and developed an understanding of the nature of the marketing of risk itself, and the impact that practice had on society. By the seventeenth century, the common law discarded the idea that gaming, wagering and betting were simply undesirable impedi-

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or games, and not as a rule against gambling *per se*. By the middle of the seventeenth century, discrete rules on gambling, wagering and venturing on chance had emerged from the general regulation of games and sports. The whole story of anti-gambling laws is contained in the emergence of subcategory 4, above—causing impoverishment and dishonesty in children, servants and other unwary persons—as the rationale for a separate body of law aimed at preventing risk-taking on issues of chance connected with sporting events or games, and then finally preventing risk-taking on issues of chance *per se*.

[183] *Id.*

[184] *See, e.g,* OXFORD DICTIONARY & THESAURUS 602 (Am. ed. 1996) (defining "gamble" as to "take great risks in the hope of substantial gain.").

ments to socially valuable activities (national defense, husbandry, etc.), and the true nature of the problem underlying all gambling began to emerge as a separate concept, with generic legal rules replacing piecemeal tinkering.[185] The disease was separated from its symptoms, and the modern age of gambling regulation was born.

Before this transformation occurred, the various terms used to describe and define prohibited gambling reflect the early connection with sporting events (hence "gaming" serves as a synonym for "gambling" in modern usage). As will appear in the following analysis of the English and American law, the terms used in the legal regulation of gambling also assumed an interchangeable generic quality, and were descriptive of similar offenses against the same underlying public policy. The term "lot" was used interchangeably with "chance," and "lottery" was used interchangeably with "gaming" or "games of chance."[186]

In the evolution of laws dealing with lottery, as opposed to gaming or gambling otherwise described, there is absolutely no evidence that the vice sought to be prohibited or regulated consisted of the stereotyped form in which gambling was conducted. Whether a lottery was conducted in a game of chance involving cards, by selling tickets, or by some other device, the vice was eventually viewed as the same: the risk of money or property on an issue of chance, and the social ills resulting from the powerful inducement to risk all on the chance of "hitting it big."

To begin with, the earliest English usage of the term "lot" or "lottery" was as a synonym for "chance."[187] The *Oxford English Dictionary* lists the earliest known definitions and usages of the term "lottery."[188] The definitions listed include

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[185] *See infra* notes 216-20 and accompanying text.

[186] *See infra* notes 188-89 and accompanying text.

[187] *See infra* notes 188-89 and accompanying text.

[188] 9 OXFORD ENGLISH DICTIONARY 43 (2d ed. 1989). The English word "lottery" is derived from Italian, "lotteria" taken from the Latin "lotto" meaning simply a game of chance. Chisolm, *supra* note 177, at 20 n.1. The original root word was Teutonic, and appeared in Old English as "hlot." Chisolm, *supra* note 177, at 20 n.1. This word was adopted into the Romanic languages, and accounts for the similar derivatives found in modern Romance languages, as well as other lan-

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guages that borrowed from the original Latin, e.g. Dutch "lot," German "loos," Danish "lod" and French "lotteria." Chisolm, *supra* note 177, at 20 n.1. The exact meaning of the original Teutonic word "hlot" is obscure, but is believed to have been originally a reference to an object with which a game of chance is played, such as a disk or counter of wood, a pebble, bean or the like, which is drawn or cast to decide by chance . . . . From this original sense the meaning develops into that which falls to a person by lot, chance or fate, then to any portion of land, etc., allotted to a person, and hence, quite generally, of a quantity of anything. Chisolm, *supra* note 177, at 20 n.1. In modern English usage, the term "a lot" suggests a large rather than a small quantity.

See also A CONCISE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 302 (Skeat ed. 1901) ("Lot, a portion, share . . . to obtain by lot."). The term "lot" was Anglo Saxon "hlut." The word "lottery" was formed by adding "-ery," a French suffix, to the English "lot" derived from the Teutonic "hlot" or "hlut." *Id.* Examples of similar derivative words given by this source are "brew-ery," i.e. a place where the activity of brewing is conducted, and "fish-ery," i.e. a place where the activity of catching fish takes place. *Id.* A "lottery" is present anywhere "obtaining by lot" takes place. *Id.* Obviously, these terms emphasize the activity referred to in the root word, and the particular place where the activity occurs is secondary. Anywhere the making of "brew" occurs may be described as a "brewery." *Id.* The activity is definitive. *See id.* Hence it is common in the law to refer to a lottery as a "scheme," i.e. an activity. "Chance," which is identified in the law as synonymous with "lot," derives from the Old Latin verb "cadere," which means to fall, or to happen. *Id.* In Late Latin, the noun "cadentia" evolved, and meant "a falling" or "a chance." *Id.* In Old French, the word became "cheance," and mutated into Middle English as "cheaunce." *Id.*

In contrast, bets or wagers are contracts (in both common usage and in legal terms). *See infra* notes 301-02 and accompanying text. Betting or wagering, the verb form of this term, refers to the activity which leads to those contracts, and were terms used interchangeably with "gaming" by the nineteenth century. Thus 8 & 9 Vict. ch. 109 §18 (1845) provided that, "All Contracts or Agreements, whether by Parole or in Writing, by way of gaming or wagering, shall be null and void."

The word "wager," like "lot," also was derived from the Teutonic languages into Latin, and then into other languages derived from Latin. In Latin, it first appeared as the verb "vadiare," meaning "to pledge," and then it became "wageur" in Old French, and in Late French became "gageur," and "wager" in Middle English. In early English law, the use of the term "gage" to mean a pledge or security was common. If someone pledged or "gaged" a piece of real property as security for a loan of money for a set period of time, and wished to pay back the money and reclaim the land at the end of that time, he would tender the money to his creditor with the message that the gage or pledge was "mort," or dead, hence our term "mortgage," or "dead gage." F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 39-40 (1909).

By the sixteenth century, the noun "wager" had assumed its formal contractual meaning, "[a]n agreement or contract under which each of the parties promises to give money or its equivalent to the other according to the issue of an uncertain event." The *Oxford English Dictionary* provides numerous sixteenth century examples of this usage. The noun "wager" became synonymous with "bet" specific examples of the form a lottery has assumed: "An arrangement for the distribution of prizes by chance among persons purchasing tickets" which is "usually intended as a means of raising money for the benefit of the promoters, of the State, or of some charitable institution."[189] The definitions also include generic and functional descriptions of the characteristics that make the particular form described a "lottery:" "Decision by casting or drawing of lots, sortilege, appeal to the lot; [c]hance, issue of events determined by chance; [s]omething which comes to a person by lot or fortune."[190] Also described is a form which the generic activity called "lottery" can assume: "A round of cards, in which prizes are obtained by the holders of certain cards."[191]

Additionally, the commonly understood and popular meaning of the term "lottery" was an activity or transaction associated with chance, rather than being identified with any particular formality, such as the sale of tickets.[192] These popular us-

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in its final English usage; both terms meant a specific type of contract, where two or more parties risked money or something of value on the occurrence of an uncertain future event. *See* 19 OXFORD ENGLISH DICTIONARY, *supra*, at 806; A CONCISE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 597 (Skeat ed. 1901). John Ashton, author of *The History of Gambling in England*, illustrates the differences between a bet, a wager and a pledge. JOHN ASHTON, THE HISTORY OF GAMBLING IN ENGLAND 150 (1898). Ashton describes betting as "that peculiar form of wager which consists of a material pledge in corroboration of controverted assertions." *Id.*

By contrast, the term "lottery" was a broad term that included activities which could take many forms, all having in common the feature of an "appeal to the lot" or "issue of events as determined by chance." *See* OXFORD ENG. DICTIONARY, *supra*, at 43.

[189] *See* 9 OXFORD ENGLISH DICTIONARY, *supra* note 188.

[190] 9 OXFORD ENGLISH DICTIONARY, *supra* note 188 (emphasis added). The English appellate judges consistently employed the simple dictionary definition of lottery. *See* Barclay v. Pearson, 2 Ch. 154, 164 (Div'l Ct. 1893). Additionally, the term "lot" itself became synonymous with "chance". *See* THE CYCLOPEDIC LAW DICTIONARY 566 (1912) (defining "lot" as "[t]hat which fortuitously determines what we are to acquire.").

[191] *See supra* note 188.

[192] *See* WILLIAM SHAKESPEARE, JULIUS CAESAR act 2, sc.1, li. 118-19, *reprinted in* THE COMPLETE WORKS OF SHAKESPEARE 1034 (David Bevington, ed., 4th ed. 1997) ("So let high-sighted tyranny rage on Till each man drop by lottery."); WILLIAM SHAKEPEARE, TROILUS & CRESSIDA act 2, sc.1, li.127-28, *reprinted in* THE COMPLETE WORKS OF SHAKESPEARE, *supra*, at 460 ("Who shall answer him? I

ages were prevalent in England by the seventeenth century, the century that saw the first legislation dealing with gambling apart from particular games or sports, and that saw the first legislation aimed at the gambling activity described as a lottery. As will become evident, the different enactments are but variations in the treatment of the same underlying problem.[193] It is helpful to trace the evolution of English statutory law up to the time at which enactments were aimed at gambling generically, rather than at the abuses connected with some particular game or sport.

The earliest English statute dealing with "gaming" was enacted in 1388.[194] The statute provided that no "servant of

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know not. 'Tis put to lottery."); WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 2, sc.1, li. 127-28, *reprinted in*, THE COMPLETE WORKS OF SHAKESPEARE, *supra*, at 185 ("Besides, the lott'ry of my destiny Bars me the right of voluntary choosing."); *id.* at act 2, sc. 2, li.15-16 (" . . . the lottery that he hath devised in these three chests of gold, silver, and lead . . . "); WILLIAM SHAKESPEARE, ANTONY AND CLEOPATRA act 2, sc.2, li. 251-53, *reprinted in* THE COMPLETE WORKS OF SHAKESPEARE, *supra*, at 1309 ("If beauty, wisdom, modesty can settle the heart of Antony, Octavia is A blessed lottery to him."). The *Oxford English Dictionary* also lists early usages identifying lottery with chance: "Lottery is the deciding or determination of a doubt by some causal event." 9 OXFORD ENGLISH DICTIONARY, *supra* note 188, at 43.

[193] The psychological power of chance-taking was observed in ancient times. In his *History*, Herodotus tells of the inhabitants of the city of Sardis in Lydia, who, after their city was sacked by Cyrus of Persia in 547 B.C., experience eighteen years of scarcity and famine. HISTORY OF HERODOTUS 22-23 (Everyman's ed. 1952). To distract themselves from their misery, Herodotus says that they invented and practiced games of chance, which they played every other day to allow them to fast and take their minds off of their hunger. *Id.* Herodotus also reveals that the Lydians understood "lot" to mean "chance:"

> In the days of Atys, the Son of Manes, there was great scarcity through the whole land of Lydia. For some time the Lydians bore the affliction patiently, but finding that it did not pass away, they set to work to devise remedies for the evil. Various expedients were discovered by various persons; dice and huckle-bones, the ball, and all such games were invented, except tables, the invention of which they do not claim as theirs. The plan adopted against the famine was to engage in games one day so entirely as not to feel any craving for food, and the next day to eat and abstain from games. In this way they passed eighteen years. Still the affliction continued and even became more grievous. So the king decided to divide the nation on half, and to make the two portions draw lots, the one would stay, the other to leave the land . . . . The lot was cast, and they who had to emigrate went down to Smyrna.

Id.

[194] 12 Rich. II c. VI (1388) (Eng.). All references to early English statutes are

husbandry, or labourer, nor servant, or artificer, nor of victualler" would be permitted to carry any "buckler, sword nor dagger," and confined the persons described to the use of "bows and arrows."[195] The persons covered by the statute were directed to use their bows and arrows on "Sundays and holydays," and to cease "all playing at tennis or football, and other games called coits, dice, casting of the stone, kails, and other such importune games."[196] This statute was an attempt to assure the proficiency of common people in archery, which was essential to military defense, and to prevent the pursuit of gaming from interfering with such proficiency.[197]

The provisions of the statute of Richard II, above, were strengthened in a later statute passed in 1409.[198] The text of the 1409 statute reveals that the enforcement of the 1388 enactment had not been successful, and that the commoners had continued to play "such unthrifty games."[199] The sheriffs, mayors, bailiffs and constables were enjoined to rigorously enforce the 1388 statute.[200]

These early enactments were aimed at the personal conduct of those engaging in playing games (gaming). A later statute shifted the focus of the regulation to those who allowed their premises to be used for gaming.[201] In 1477, Parliament decreed that, "because the defense of this land is so much by archers," and because people who should be honing their archery skills were still playing at "many new imagined games," no "person, governor nor occupier of any house, tenement, garden, or other place within this realm, shall willingly suffer any person to occupy or play any of the said games," on penalty of three years imprisonment and a fine.[202] The earlier statutes

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to *The Statutes At Large* (Magna Carta to 1865) and *Law Reports* (1866 to present).

[195] 12 Rich. II c. VI (1388) (Eng.)

[196] *Id.*

[197] "The Tudor notion of an unlawful game was pretty much any sport or exercise that was not archery." *Notes*, 14 L.Q. REV. 119 (1898).

[198] 11 Hen. IV c. 4 (1409) (Eng.).

[199] *Id.*

[200] *Id.*

[201] *See* 17 Edw. IV c. III (1477).

[202] *Id.*

had carried a punishment of imprisonment for only six days, so the problem appears to have been taken more seriously between 1409 and 1477.[203] Significantly, the statute of 1477 recognized for the first time the association of serious crime with gaming activity, stating that "by the mean thereof divers and many murders, robberies, and other heinous felonies be oftentimes committed."[204]

The interference of gaming with archery, and hence with national defense, continued into the next century. In 1512, Parliament attempted to reaffirm the prohibitions of earlier statutes with little success, as a statute passed in 1541 made clear.[205] Not only had gambling activity increased rapidly during the sixteenth century, but also it had gone beyond being an adjunct to public functions or other games.[206] Not only had certain places come to carry on gambling apart from any public game or sport, but also new games were being offered.[207] The 1541 statute recites "many subtil inventative and crafty persons have found and daily find many and sundry new and crafty games and plays . . . in many other and divers parts of this realm, keeping houses, plays and alleys for the maintenance thereof."[208] This development was seen as causing the economic dislocation of necessary crafts and industry.[209] The statute recites not only that "archery is sore decayed" because of gaming, but also that "bowyers and fletchers, for lack of work, [have] gone and inhabit themselves in Scotland."[210] While the main purpose of this law was the maintenance of archery, other serious vices of gambling (described as impoverishment, crime and the neglect of divine service) were again clearly recognized.[211] The 1541 statute punished both those who kept gaming houses and those that resorted to them, and contained an extremely broad description of the prohibited games, to include dicing, table (backgammon) or carding, any games prohibited by previous law, and any new game "invented or thereafter to be invented."[212] Up to this point, the English statutes made no distinction between games of skill and games of chance, nor did they specify the manner in which money must be wagered or bet.[213]

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[203] *See id.*; 11 Hen. IV c. 4 (1409) (Eng.); 12 Rich. II c. VI (1388) (Eng.).

[204] *See* 17 Edw. IV c. III (1477). Numerous empirical studies of gambling verify its association with increased and organized crime.

> The history of previous experiments in legalization of gambling has shown that legalization results in an increase in gambling, particularly in increased participation by small-wage earners—the people who are least able to bear the inevitable losses. Wherever large-scale gambling has been carried on it has been the experience of law-enforcement officials that violence and crime increase in proportion to the size of the gambling operations.

THIRD INTERIM REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE (KEFAUVER COMMITTEE), S. Rep. 2-307 at 193 (1951); *see also* 104 Cong. Rec. (1995) (Statement of Sen. Simon); Lesieur, *Pathological Gambling Is a Psychiatric Disorder*, SOCIETY at 43-50 (May-June 1992), *reprinted in* LEGALIZED GAMBLING: FOR AND AGAINST 37-53 (Evans & Hance, eds. 1998).

[205] 33 Hen. VIII c. 9 (1541) (Eng.); 3 & 6 Hen. VIII c. 9 (1512) (Eng.).

[206] 33 Hen. VIII c. 9 (1541) (Eng.).

[207] *Id.*

[208] *Id.*

The focus of the English statutes shifted in the late seventeenth and early eighteenth centuries from preventing competition with military exercises and training and maintenance of critical skills in the work force to the inherent vice of gambling itself. For the first time, gambling was viewed not as an adjunct to some other activity, but was rather analyzed as a species of conduct apart from formal environment in which it was conducted.[214] Between 1664 and 1739, the English statutes made it clear that the inherent vice of gambling (whether called "gaming" or "lottery") was the seductive effect of large rewards offered for small sums to be determined by activities involving chance.[215] The first English statute to generically

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[209] *Id.*

[210] 33 Hen.VIII ch. 9 (1541).

[211] *See id.*

[212] *Id.*

[213] *See id.*

[214] *See infra* notes 216-20 and accompanying text.

[215] *See, e.g., infra* notes 216-26 and accompanying text. Once this central vice of gambling was recognized, it played the central role in defining the psychology of gambling and its destructive influence on the individual from the seventeenth century to modern times. Amazingly, the same observations on the impact of gaming on the participant and the lure of chance have continued down through the ages. "It will perhaps be said that what he seeks is the amusement of play, not gain. Let him play then for nothing; he will lose interest and be wearied."

H.L. MENCKEN, A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES 442 (1942) (quoting Blaise Pascal, who described the habitual gambler in 1670).

> [I]t renders a man incapable of prosecuting any serious action, and makes him always unsatisfied with his own condition; he is either lifted up to the top of mad joy with success, or plung'd to the bottom of despair by misfortune, always in extreams, always in a storm; this minute the Gamester's countenance is so serene and calm, that one would think nothing could disturb it, and the next minute, so stormy and tempestuous that it threatens destruction to itself and others; and, as he is transported with joy when he wins, so, losing is he tost upon the billows of high swelling passion, till he hath lost sight, both of sense and reason.

CHARLES COTTON, THE COMPLEAT GAMESTER (1684), *quoted in* ASHTON, *supra* note 188, at 1. Similarly, William Blackstone, writing in the mid-eighteenth century, noted the persistence of the same gambling-related psychology and problems since ancient times:

> [T]he company engaged therein [in gambling] do, in general, exceed the bounds of their respective fortunes; and therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer. But, taken in any light, it is a offence of the most alarming nature; tending by necessary consequence to promote public idleness, theft and debauchery among those of the lower class, and among persons of a superior rank, it hath frequently been attended with the sudden ruin and desolation of ancient and opulent families . . . and too often hath ended in self-murder.

BLACKSTONE, *supra* note 13, at 171. Blackstone went on to quote Tacitus, the ancient historian who referred to the destruction and enslavement of the ancient Germans because of gambling, and ended with the observation, "One would almost be tempted to think that Tacitus was describing a modern Englishman." BLACKSTONE, *supra* note 13, at 171. Blackstone goes on to discuss the variety of ways in which a lottery could be set up, commenting on "private lotteries by tickets, cards or dice (and particularly the games of faro, basset, ace of hearts, hazard, passage, rolly polly, and all other games with dice . . . ."). BLACKSTONE, *supra* note 13, at 172. He also refers to the statutory prohibitions on "all manner of ingenious devices, under the denomination of sales or otherwise, which in the end are equivalent to lotteries." BLACKSTONE, *supra* note 13, at 173 (citing the statutes previously discussed herein).

In 1810, an American judge commented:

> When the heart is once thoroughly possessed of this passion, every thing is sacrificed to its gratification. In the mad pursuit, health and constitution are gradually destroyed by irregular hours, and disorderly conduct. Sleepless nights, corroding passions, and a neglect of business, accompanied with the intemperate use of ardent spirits, soon plunge both the gamester and his family into one common ruin. That this is not a false, or exaggerated description, candor itself must acknowledge—and, I think, it must at the same time be as readily acknowledged to be the duty of every friend of virtue and his country, to abstain from an amusement pregnant with the strongest temptations to avarice, fraud, lying, cursing,

regulate gambling itself, as opposed to some related game or sport, was enacted in 1664.[216] The general tendency of gambling to promote fraud and deceit and to impoverish its participants was acknowledged by Parliament as a core problem that transcended the tendency of gambling to undercut other valuable social functions.[217] Significantly, the 1664 statute also recognized the destructive effect of gambling on all social classes, and not just on "lieges" or commoners.[218] Gambling was beginning to be officially viewed as a generalized vice potentially damaging to all levels of society, as opposed to a random interference with some of its specialized functionaries, such as soldiers or farmers. The preamble recites the "deceiving, cousening and debauching many of the younger sort, both of the nobility and gentry, and others," to the extent that they suffer "the utter ruin of their estates and fortunes."[219] The statute was as broad as possible concerning the gaming activity regulated, as extending to:

> swearing, contention, fretfulness, and every emotion that can disorder the heart.

JUDGE RUSH, GAMING, ITS PERNICIOUS TENDENCY AND EFFECTS 3-5 (1810). More modern observers emphasize the same psychological aspects of the lure of chance:

> The mental energy of the pathological gambler is almost always constantly concentrated on gambling, on computing chances and making prognostications. His fantasies and daydreams center around this one idea; the pathological concentration overshadows everything else—vocation, love, hobbies . . . . The gambler is apparently the last optimist; he is a creature totally unmoved by experience. His belief in ultimate success cannot be shattered by financial loss, however great . . . . The result of this pathological optimism is that the true gambler never stops when he is winning, for he is convinced that he must win more and more. Inevitably, he loses . . . . It is this fatal optimism which drives the gambler to push his luck too far, that ensures the solvency of gambling houses . . . . *The normal person does his best to avoid painful uncertainty, but uncertainty is precisely what a gambler seeks.* A glib rationalization for this might be that the gambler expects to win and therefore feels elated in advance.

EDMUND BERGLER, M.D., THE PSYCHOLOGY OF GAMBLING (1957), *reprinted in part* in R.D. HERMAN, GAMBLING 113ff, 115-16 (1967)

[216] 16 Char. II c. 7 (1664). It also established "treble damages" as a measure of recovery. *Id.*

[217] *See id.*

[218] *Id.*

[219] *Id.*

> [a]ny person or persons . . . which shall by . . . playing at or with cards, dice, tables, tennis, bowles, kittles, shovel-board; or in any cock-fightings, horse-races, dog-matches, foot-races, or other pastimes, game or games whatsoever, or in or by bearing a share of part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do play, act, ride or run as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever.[220]

This statute was the predecessor for the later famous Statute of Anne.[221] Under the 1664 statute, every loser was given six months within which to sue for gambling losses, which were to be trebled, with one half of any recovery to go to the Crown.[222] If the loser did not sue, "such person or persons as shall or will prosecute or sue for the same within one year next after the six months expired" were awarded one-half of treble the gambling loss, with the remainder to the Crown.[223] The statute prescribed the form of action to be used as an "action of debt, bill, plaint or information, in any of his Majesty's courts."[224] The statute further renders any contract or security for a gambling debt in excess of one hundred pounds null and void, and allows treble recovery from the gambling creditor.[225] The statute did not distinguish between games of skill or chance, but was aimed at both.[226]

Meanwhile, a familiar and ancient form of gambling, the lottery, began to flourish in England, as it had elsewhere since ancient times.[227] It was this form of gambling, a lottery, with its many forms all reliant on chance, which would eventually

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[220] *Id.*

[221] 9 Anne ch. 14 (1710). This statute allowed a loser to recover gambling losses, and provided a *qui tam* proceeding which permitted another person to recover such losses in case the actual looser failed to do so. *Id.* This statute was in force in England from 1710 to 1845, but an essentially identical provision was found in numerous state codes in America. *See* S.C. CODE ANN. §32-1-10 et seq (1991).

[222] 9 Anne c. 14 (1710).

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] The *Encyclopaedia Britannica* states "The word lottery has no very definite

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signification. It may be applied to any process of determining prizes by lot, whether the object be amusement or gambling or public profit." 17 ENCYCLOPAEDIA BRITANNICA, *supra* note 177, at 20.

The term "by lot" means simply "by chance." The seventeenth century English statutes and the later American colonial enactments used the term in this fashion, with no requirement that the game of chance be conducted in any particular form. The selling of tickets was simply one alternative method of conducting a lottery, but any game whose outcome was determined by chance would come within the definition of a lottery. The statute, passed by the South Carolina Assembly in 1762, penalized "[e]very person or persons whatsoever, who . . . shall cause to be erected, set up, exposed, to be played, drawn or thrown at . . . any lottery . . . *or by any undertaking whatsoever in the nature of a lottery*, by way of chances, wither by dice, lots, cards, balls, numbers, figures *or tickets*." J.F. GRIMKE, THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA 256-57 (1790) (emphasis added). It is significant that Grimke, who compiled the statutes for the year 1790, did not index "lottery" separately, but rather directed the reader to "See Gaming." *Id.* In the index entry on "Gaming," lottery is listed as merely another of the many forms of gaming. *Id.*

Indeed, the earliest records of this variant of gaming appears not to have involved the sale of tickets at all, but rather employed objects which were thrown to yield a result determined by chance. In 9 OXFORD ENGLISH DICTIONARY, *supra* note 188, at 39, the incorporation of the Teutonic root of the word "lot" paired it with a verb which meant "to throw." "In genuine Old English idiom the verb governing 'hlot' was weorpan, to throw." 9 OXFORD ENGLISH DICTIONARY, *supra* note 188, at 39. Hence the early usages of the term "lot" involve, "an object (apparently usually a piece of wood) used in a widely diffused ancient method of deciding disputes, dividing plunder or property, selecting persons for an office or duty, etc. by an appeal to chance or the divine agency supposed to be concerned with the results of chance." 9 OXFORD ENGLISH DICTIONARY, *supra* note 188, at 39. In its earliest form, the casting of lots employed one or more objects, probably made of wood or bone. See generally 9 OXFORD ENGLISH DICTIONARY, *supra* note 188, at 39-41 for usages of the word "lot" from ancient to modern times.

The practice of casting lots was familiar in the ancient world. Both the Old Testament and the New Testament of the Authorized King James Version of *The Holy Bible* make references to this procedure. *See Matthew* 27:35 (King James) ("And they crucified him, and parted his garments, casting lots: that it might be fulfilled which was spoken by the prophet, They parted my garments among them, and upon my vesture did they cast lots."); *Acts* 1:24-26 (King James) (referring to the replacement of Judas, the traitor, after the death of Christ, by casting lots); *Proverbs* 1:14 (King James ("Cast in thy lot among us; let us all have one purse."); *Numbers* 26:55-56 (describing God's instructions to Moses as to the allotment of new lands among the tribes of Israel: "Notwithstanding the land shall be divided by lot: according to the names of the tribes of their fathers they shall inherit. According to the lot shall the possession thereof be divided between many and few."); *Leviticus* 16:7-10 (King James) (referring to how Aaron was to choose which of two goats would be a sacrifice as a sin offering and which would be a scapegoat to make atonement).

cause Parliament to single out gaming which produces outcomes primarily dependant on chance, but in 1664 "excessive gaming" included both games of skill and games of chance.[228] Significantly, the vice of gambling was also conceptually distinguished from cheating and from a dishonestly conducted gaming transaction. The inherent vice of a game was the employment of chance alone. Thus the term "lottery" first appeared in the law as a term signifying undesirable gaming, and was used to generically describe risk-taking based on chance, no matter what forms the game or inducement took.[229] Some forms of gaming could involve skill, and cheating and deception could be used for gain even in those games. Some forms of gaming did not require overt cheating, but only involved the seductive chance of winning inordinate prizes in exchange for a small sum, with the issue determined by chance. This was the essence of a lottery–the possibility that a small investment could yield a large reward based on the occurrence of something that might happen.

The passage of the *Acts for Suppressing of Lotteries* in 1698 began the process of refinement in the definition of "lotteries" which eventually focused on the functional elements that made gambling generally so seductive and damaging to the ordinary person: the lure of a disproportionate award (a prize) for an initial investment with the outcome seemingly determined by chance, without deceit or cheating.[230] The 1698 Act also set the pattern for later American colonial legislation. It employed the typical broad and generic description of a "lottery" as *any* game of chance.[231] After reciting the public policy against "the utter ruin and impoverishment of many families," the Act provided that:

> [N]o person or persons whatsoever shall publickly or privately exercise, keep open, shew or expose to be plaid at, drawn at, or thrown at, or shall draw, play or throw at any such lottery, or any other lottery, either by dice, lots cards, balls, or any

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[228] 16 Char. II c. 7 (1664).

[229] *Id.*

[230] ACTS FOR SUPPRESSING OF LOTTERIES (1698).

[231] *Id.*

other numbers or figures, or in any other way whatsoever.[232]

The description in the statute of the variety of ways in which a lottery could be conducted, particularly the use of the modifying phrase "or any other lottery" to expand on the various examples of games of chance, and the closing with "in any other way whatsoever,"[233] leaves no doubt that Parliament did not intend the term "lottery" to be confined to one stereotypical transaction, such as the selling of tickets for a drawing, but rather it applied to *any* method of gaming dependent on chance. Significantly, the statute specifically focused on only those games known to employ the quality of chance, as opposed to the earlier statutes aimed at sports or amusements, which may also involve skill.[234]

Later legislation made it clear that Parliament understood the definition of "lottery" as a synonym for "chance," and that games of chance or lotteries constituted a particularly damaging activity which could take a countless number of forms.[235] In contrast to the suppression of private lotteries or games of chance, it was customary in both England and America for the government to conduct various highly-regulated lotteries to raise money for public purposes.[236] Rather than being an invention of the modern era, this practice dates back to the ancient world.[237] The aristocrats of the Roman Republic had conducted entertainment involving the winning of prizes by lot, and the practice was imitated by the government during the Roman Empire.[238] This custom was inherited and perpetuated by the feudal and merchant princes of Europe after the fall of the Roman Empire.[239] In the Italian republics of the sixteenth century, the use of a public lottery to promote the sale of goods became commonplace, and the Florentine lottery, or "Lotto" became famous, along with the lotteries of Genoa and Venice.[240] King Francis I granted a patent for the conduct of a lottery in France in 1539.[241] In 1656, an Italian, Lorenzo Tonti, inventor of the "tontine," ran a lottery in France for the building of a public bridge.[242] In England, public lotteries had begun in 1569, continued until 1860, and were revived again in the twentieth century.[243]

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[232] *Id.* Significantly, the statute prohibits those who "keep open, shew or expose to be plaid, drawn at, or thrown at . . . any such lottery, *or any other lottery*" conducted in "any way whatsoever." *Id.* (emphasis added); *c.f.* S.C. CODE ANN. §16-19-10 (1985) (prohibiting merely setting up or offering to the public a scheme or enterprise whereby a price would buy a chance for a prize).

[233] ACTS OF SUPPRESSING LOTTERIES (1968). The statute continues in Paragraph II to prescribe penalties for any person who "shall exercise, expose, open or shew to be plaid, thrown or drawn at, *any such lottery, play or device, or other lottery* . . . ." *Id.* (emphasis added). This language in the 1698 Act was repeated in anti-lottery legislation through the following centuries, and was always held to support a broad definition of lottery extending beyond any one type or procedure of game, such as the selling of tickets. See the application of a successor to the 1698 Act, 42 Geo. III c. 119 (1802) cited in *Jeffs v. Blackmon*, 44 Eng. Rep. 378, 380 (1864).

[234] *Compare* ACTS OF SUPPRESSING LOTTERIES (1968) *with* 12 Rich. II c. VI (1388) (Eng.).

[235] *See infra* note 269 (discussing 11 Geo. II c. 28 (1739)).

[236] 17 ENCYCLOPEDIA BRITANNICA, *supra* note 177, at 20.

The original European settlers in America brought the tradition of public lotteries with them.[244] In the United States, the separation of public and private lotteries began early on, with a marked tendency to permit the former and curtail the latter developing as a legal trend in the eighteenth century. The Continental Congress employed a public lottery to raise money in 1776, and most states after the Revolution followed suit and allowed public licensed lotteries for specified public purposes, such as roads and schools.[245] What William M. Thompson calls the first of three waves of gambling occurred in America between the Revolution and 1860.[246] Amazingly, the income from public lotteries during this period came to vastly exceed the entire federal budget.[247]

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[237] 17 ENCYCLOPEDIA BRITANNICA, *supra* note 177, at 20.

[238] 17 ENCYCLOPEDIA BRITANNICA, *supra* note 177, at 20.

[239] 17 ENCYCLOPEDIA BRITANNICA, *supra* note 177, at 20.

[240] 17 ENCYCLOPEDIA BRITANNICA, *supra* note 177, at 20.

[241] 17 ENCYCLOPEDIA BRITANNICA, *supra* note 177, at 20.

[242] 17 ENCYCLOPEDIA BRITANNICA, *supra* note 177, at 20. By the seventeenth century, the use of a public lottery had become a familiar part of governmental finance in Western Europe. The form was imitated privately, which prompted a nearly universal suppression of private lotteries. France did not suppress private lotteries until 1776, and continued public lotteries into the nineteenth century, while England acted to suppress private gambling in the nature of a lottery in 1698. 17 ENCLYCOPEDIA BRITANNICA, *supra* note 177, at 20.

[243] HALSBURY'S LAWS OF ENGLAND 49-54 (F.M Walter & K.H. Mugford eds. 1976). The first English public lottery took place at St. Paul's Cathedral, from January 11 until May 6, 1569. *Id.* The profits were used to repair coastal defenses, and the prizes were pieces of plate. *Id.* Each "lot" was sold for ten shillings. The first lottery offering money as a prize in England was held in 1630. JOSEPH HAYDN, A DICTIONARY OF DATES RELATING TO ALL AGES AND NATIONS 406 (9th ed. 1860)

[244] WILLIAM H. THOMPSON, LEGALIZED GAMBLING 6 (2d ed. 1997). Early American settlers reported finding Native Americans conducting gaming and wagering activities similar to their own. *Id.* Native Americans often wagered on games like lacrosse, footraces or original games involving a test of hunting or war-making skills. *Id.* Occasionally, wagering would take place independently of any particular game, such as in the use of dice. *Id.*

A second wave of public gambling occurred immediately after the Civil War, when state and local governments desperately sought to refill depleted public treasuries.[248] The southern states in particular turned to the lottery, but only one such public lottery survived after 1878–the notorious Louisiana Lottery.[249] This lottery became so scandal-ridden that Congress destroyed its most significant patronage by banning interstate sale of lottery tickets in 1890, forcing the Louisiana Lottery to close down two years later.[250]

The conduct of public lotteries as a legitimate method of raising public revenue had died out by the beginning of the twentieth century, and political support only reappeared after the middle of the twentieth century, when the New Hampshire legislature created a state-run sweepstakes in 1963, thus beginning the third and current phase of gambling in America.[251] As William Thompson says of the current period: "Of all of the Canadian and U.S. jurisdictions, only Hawaii and Utah authorize no legal gambling. (Horse race wagering is permitted by Tennessee law, but there are at present no tracks in operation; hence 47 states and all Canadian jurisdictions have some form of legalized gambling today.")[252] Moreover, the types of gambling activity that flourished in many states in the United States in the late twentieth century proliferated in some unprecedented ways. Advancing technologies made it possible to replicate an infinite variety of gambling forms and broadly distribute them geographically. Video gambling machines could economically and profitably be produced in staggering numbers, and then dispersed to even the least populated and remote areas of a state. All that was necessary was for the aspiring gambling operator to find a legal environment where there was at least a plausible argument that the machines did not violate any gambling law. As we have seen, the third and final wave of gambling in America saw the most explosive combinations in gambling history finally come together as never before. The irresistible temptation of enormous profits, the combination of highly refined lawyering and lobbying efforts, a more scientific understanding of the psychology of gambling activity, modern technology, a near-complete public ignorance of the history of this age-old human endeavor, and a robust economy combined in twentieth century America to give gambling another golden age.

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[245] *Id.* at 7.

[246] *Id.*

[247] *Id.* at 8:

> One report estimates that between 1790 and 1860, 24 of 33 states financed buildings, roads, and bridges from lottery revenues. This era peaked in 1831, when 8 states ran 420 lottery games and sold more than $66 million in tickets. This sum was five times that of the federal budget that year.

[248] *Id.* at 10.

[249] *Id.*

[250] *Id.*

[251] *Id.* at 12.

By the beginning of the eighteenth century, perhaps the most significant historical feature of Anglo-American gambling law was that it had finally come to define gambling in broad, generic terms that addressed certain universal psychological constants in human behavior, rather than focusing on particular games or sports. The legal concept of lottery was thus sufficiently broad and generic that legal prohibitions were thought to be sufficient to control whatever social harm gambling might cause. Thereafter, it was not thought to be necessary to catalogue all the forms that potentially destructive gambling could take, so long as a broad, well-understood generic prohibition was available, such as a statutory or constitutional ban on lotteries, public or private.

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[252] *Id.*

Though the routine formalities of a public lottery give one impression of a lottery as being a stereotyped transaction involving the sale of tickets and a drawing, no such limited definition was ever recognized in the general prohibitions on private lotteries which began with the English Lottery Act of 1698, and continued in the United States down through the legal history of both the states and the federal government.[253] The particular formalities of the numerous public lotteries which have been conducted in America since 1776 do not affect the fact that the prohibition and regulation of *private* lotteries have always treated them as involving a broad range of games involving risk-taking on an issue of chance.

Thus, even after the Lottery Act of 1698, the English Parliament continued to authorize the conduct of public lotteries, while at the same time strengthening the prohibitions on private lotteries.[254] The beginning of the eighteenth century saw yet another variation on the methods used by private parties to conduct lotteries. The increasing public use of lotteries prompted numerous persons to offer a lottery in the same form used by the state. This was merely another example of the typical pathology of gambling—seemingly endless innovations in the methods of offering a lottery in an attempt to evade the letter of existing law.[255] In 1710, Parliament attempted to restrict not only private lotteries, which were conducted in a manner similar to that of public lotteries, but also to continue the general ban on private lotteries begun in 1698.[256] The 1710 statute's preamble reads, in part: "Whereas . . . several persons of late have presumed, contrary to the intent of the said act, to set up lotteries in imitation of the lottery directed to be drawn by virtue, which are prejudicial to the public . . . ."[257] The statute also directed that the 1698 Lottery Act "shall be put in execution," with no hint that the broad definition of lottery in the 1698 statute was to be narrowed to gaming practices involving the sale of tickets or some other stereotyped form of gambling activity. To the contrary, the 1710 Act simply provided specific directives to a wide variety of civic and law enforcement officials (constables, bailiffs, mayors, etc.) to assure "the more effectual suppressing and preventing of such unlawful lotteries."[258] Clearly, Parliament recognized that private lotteries could be conducted in the manner of a public lottery, by the sale of tickets, *or* by other traditionally prohibited means involving chance. Parliament addressed the various manifestations of gambling as they occurred, and as existing law proved

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[253] *See* Horner v. United States, 147 U.S. 449 (1893) (involving the prosecution under the federal statute prohibiting the use of the United States mails in connection with a lottery). The relevant statute, passed in 1890, preserved the common understanding that "lot" and "chance" were synonymous terms. It read: "No letter, postal card or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes *dependent upon lot or chance* . . . shall be carried in the mail." *Id.* at 449-50 (emphasis added). The Court in *Horner* went on to outline the meaning of the term "lottery" as it was understood by virtually all American courts by the late nineteenth century. The Court said:

> In law the term lottery embraces all schemes for the distribution of prizes by chance, such as policy-playing, gift-exhibitions, prize-concerts, raffles at fairs, etc., *and includes various forms of gambling*. Most of the governments of the continent of Europe have at different periods raised money for public purposes by means of lotteries; and a small sum was raised in America by the Continental Congress. Both State and private lotteries have been forbidden by law in Great Britain and in nearly all of the United States, Louisiana and Kentucky being the two notable exceptions . . . . In Webster's Dictionary, "lottery" is defined as "[a] distribution of prizes by lot or chance." In Worcester's Dictionary, it is defined as "[a] distribution of prizes and blanks by chance; a game of hazard, in which small sums are ventured for the chance of obtaining a larger value, either in money or in other articles."

Id. at 458-59 (emphasis added). The Court expressed the common American view that "lot" means the same thing as "chance," and that a lottery does not have to depend entirely on chance, but some element of certainty can be involved: "The element of certainty goes hand in hand with the element of lot or chance, and the former does not destroy the existence or effect of the latter." *Id.* at 459.

[254] *See* 9 Ann. c. 6 (1710) ("An act to . . . raise fifteen hundred thousand

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pounds, by way of a lottery . . . ."). For a history of public lotteries in the form of ticket sales and drawings, and private lotteries imitating the public ones, see generally JOHN ASHTON, A HISTORY OF ENGLISH LOTTERIES (1893).

[255] This invention of new methods of evading the letter of existing lottery law is probably the most universal and constant theme in the history of lotteries. *See* State v. Lipkin, 84 S.E. 340, 343 (N.C. 1915) ("[N]o sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter of the definition.")

[256] 9 Ann. c. 6, ¶ LVI (1710).

[257] The imitation of the public lottery, or attempts of private parties to offer a lottery similar to the one legalized by Parliament, was a constant problem in England. *See also* 8 & 9 Vict. c. 74 (1845).

[258] 9 Ann. c. 6 (1710).

insufficient. The conduct of lotteries or gaming could take many forms, and the fact that some statutes addressed lotteries conducted in the fashion common to public lotteries in no way suggested that the broad definition of lottery was to be confined to that method of gaming only, i.e., the sale of tickets. Nowhere is there any indication that, by addressing the particular gaming problem of the moment, Parliament intended to confine gaming restrictions to the stereotype addressed in the latest statute. As we shall see, Parliament maintained the broad definition of lottery at the same time it continued to address the latest form assumed by a prohibited private lottery. Thus statutes broadly defining lottery coexisted with a growing list of statutes aimed at particular lottery practices.[259]

The statutory law in the eighteenth century continued with a mixture of specific and general regulation of gambling and lotteries. In 1710, Parliament passed the statute which became the foundation of a large body of American statutory law against gambling, the Statute of Anne.[260] To the usual criminal penalties, this statute added a "private attorney general" provision enlisting the efforts of private litigants in combating gambling.[261] Parliament nullified the transfer or conveyance of property or other securities in consideration of any gambling debt "won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides of hands of such. . . ."[262] In Section II, the statute established the right of anyone losing ten pounds or more at any one gambling transaction to sue for the recovery of his losses within three months "by action of debt founded on this act," and, in the absence of such a suit by the loser, allowing any other "person or persons" to sue for treble the amount of the loss, one half of the recovery going to the person so suing and the other half going to the parish.[263] The statute went on to prescribe criminal penalties for the same conduct.[264]

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[259] Not only did Parliament attempt to suppress private lotteries, but it eventually outlawed the advertisement or sale of foreign lottery tickets in England. 6 & 7 Will. IV (1836).

[260] 9 Ann. c. 14 (1710). The English statute was interpreted by the courts to allow a loser in a gaming transaction to recover his losses, to allow another to do so in case of the loser's failure to sue within ninety days, and also to relieve the loser of any obligation to pay in the first instance. Thorpe v. Coleman, 13 Eng. Rep. 833, 835-36 (1845).

[261] 9 Ann. c. 14 (1710).

[262] *Id.*

England and America took different paths in the regulation of gaming and lotteries after their separation following the American Revolution. By 1845, Parliament had declared *all* gaming and wagering contracts to be unlawful, and thus the Statute of Anne, which was designed to allow the loser to recover his losses, was repealed in England.[265] Many American jurisdictions continued to use the Statute of Anne, and some do so today. Though English and American law took their own separate courses after 1776, American law continued to borrow from the English law.[266] The English view was that it would be improper to allow the courts to assist the enforcement of an illegal contract, or to be involved in any capacity connected with such a contract. Therefore, under the prevailing English view, the gambling loser could not get his money back, and should not have paid it to begin with. Under the American view, a gambler should not be allowed to keep his ill-gotten winnings.[267]

Nothing better illustrates Parliament's intentional perpetuation of the broad definition of lottery contained in the 1698 Act than the fact that most subsequent legislation recited the intention to secure better enforcement of the 1698 statute's broad ban on lotteries, while at the same time addressing each new innovative form assumed by a private lottery. After the Statute of Anne, which contained specific prohibitions against lotteries taking the form of ticket sales, Parliament passed another act aimed at this same type of lottery in 1721.[268] Thereafter, in 1739, Parliament passed the Act for the More Effectual Preventing of Excessive and Deceitful Gaming.[269] The 1739 Act began by reaffirming the 1698 Lottery Act and the specialized lottery legislation that followed the 1698 Act, and then went on to treat lottery simply as gaming, capable of taking many forms.[270] The 1739 Act reads:

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[263] *Id.*

[264] *Id.* This statute was adopted in South Carolina by the "reception" statute of 1712. GRIMKE, *supra* note 227, at 20.

[265] *See* 8 & 9 Vict. c. 109, ¶ 15 (1845).

[266] In 1712, the South Carolina Assembly adopted the Statute of Anne for the prevention of "excessive and deceitful gaming." GRIMKE, *supra* note 227, at 20. This law was carried forward in subsequent codifications and remained at S.C. CODE ANN. §§ 32-1-10-32-1-20 (1977) until the year 2000. The private civil remedy for gambling losses has a federal parallel in current American law. RICO § 1961(1)(A) lists unlawful gambling activity (as defined by state law) as a RICO predicate act, and RICO § 1961(1)(B) includes the Illegal Gambling Business Act, 18 USC § 1955 (2000) as usable under RICO. RICO thus allows anyone suffering losses in gambling conducted in violation of the referenced laws to recover treble damages and attorney's fees.

[267] *See Notes,* 34 L.Q. REV. 107 (stating that "no person can bring an action which is based upon an unlawful contract").

> That any person or persons shall . . . erect, set up, continue, or keep any office or place, under the denomination of a sale or sales of houses, land, advowsons, presentations to livings, plate, jewels, ships, goods, or other things, by way of lottery,

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[268] 8 Geo. I c. 2 (1721).

[269] 12 Geo. II c. 28 (1739).

[270] The language of the Preamble and the text of the 1739 statute are significant, in that they show the intent to perpetuate both general prohibitions on lotteries as well as former legislation aimed at particular lottery practices, such as the sale of tickets. The Preamble reads:

> Whereas in an by an act of parliament made an passed in the tenth and eleventh years of the reign of his late majesty King William the third, intituled, An act for the suppressing of lotteries (the 1698 Lottery Act); after reciting, that for divers years before making the said act several evil-disposed persons had set up many unlawful games called Lotteries . . . and had thereby most unjustly and fraudulently gotten to themselves great sums of money from the children and servants of several gentlemen, traders, and merchants, and from other unwary persons, to the utter ruin and impoverishment of may families, it is declared and enacted, That all such lotteries, and all other lotteries, are common and publick nuisances: and whereas in order to suppress all such lotteries, it is in and by the said statute enacted and declared, That . . . no person or persons whatsoever shall publickly or privately, exercise, keep open, shew, or expose to be played at, drawn, or thrown at, or shall draw, play, or throw at any such lottery, or other lotteries, either by dice, lots, cards, balls, or any other number or figures, or any other way whatsoever . . . which said statute is enforced by an actio of parliament made in the ninth year of the reign of her late majesty Queen Anne (The Statutes of Anne, 1710).

Id. The 1739 Act goes on to also list 8 Geo. I c. 2 (1721), which was directed at the sale of tickets after the fashion of a public lottery, as another of the former statutes which had not been effectively enforced. *Id.*

> or by lots, tickets, numbers, or figures, cards, or dice; or shall make, print, advertise, or publish, or cause to be made, printed, advertised, or published proposals or schemes for advancing small sums of money by several persons, amounting in the whole to large sums, to be divided among them by chances of the prizes in some publick lottery or lotteries established or allowed by act of parliament, or shall deliver out, or cause or procure to be delivered out, tickets to the persons advancing such sums, to entitle them to a share of the money so advanced, according to such proposals or schemes; or shall expose to sale any housed, lands, advowsons, presentations to livings, plate, jewels, ships, or other goods, by any game, method, or device whatsoever, depending upon, or to be determined by any lot or drawing, whether it be out of a box or wheel, or by cards, or dice, or by any machine, engine, *or device of chance of any kind whatsoever* . . . shall forfeit the sum of two hundred pounds . . . .[271]

Should there be any doubt about the breadth of the term "lottery," the 1739 statute went on to specifically declare a variety of gaming practices, most of which did not involve the sale of tickets or the pooling of money, to be lotteries, and specifically declared that the variety of gambling in all the former statutes was different forms of the same thing—a lottery. Further, the statute used the term "lot" as merely a synonym for "chance" and identified the involvement of chance as an integral part of the type of gaming known as a lottery:

> And it is hereby enacted and declared, That the said games of the ace of hearts, pharaoh, basset, and hazard, are, and are hereby declared to be *games or lotteries*, by cards or dice within the intent and meaning of the said in part recited acts; and that all and every person or persons, who shall set up, maintain, or keep the said games. . shall be subject to all and every the penalties and forfeitures in and by this act inflicted upon any person or persons, who shall erect, set up, continue, or keep any of the said *games or lotteries* . . . shall be subject and liable to all and every penalties and forfeitures . . . .
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> . . . .

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[271] *Id.* (emphasis added).

> And be it further enacted by the authority aforesaid, That all and every person and persons, who shall be adventurers in any of the said games, lottery or lotteries, sale or sales; or shall play etc . . . shall forfeit and lose the sum of fifty pounds . . .
>
> . . . .
>
> And it is hereby further enacted by the authority aforesaid, That all and every such sale or sales of houses, lands, advowsons, presentations to livings, plate, jewels, ships, goods, or other things, *by any game, lottery or lotteries, machine, engine, or other device whatsoever, depending upon, or to be determined by chance or lot*, shall and are hereby declared to be void . . . .[272]

Thus, by 1739, statutes on lotteries as a variant of gaming or gambling had singled out the essential characteristics of a lottery which distinguished it from other forms of gambling: a lottery was a scheme to induce the risking of money on an activity that was determined by lot—meaning chance.[273] The abuses of other forms of gambling may differ. For example, a game of skill may be accompanied by deceit or cheating, but what made a lottery offensive was its employment of chance, and its use of all those "engines or other devices" which employed chance. It is chance which seduces, and it is chance which predictably causes the harm Parliament wished to avoid—the "impoverishment" of the unwary by preventing the use of chance as an inducement to risk money or property.

Similarly, in 1740, Parliament reacted again to the invention of yet more games which constituted lotteries,[274] and attempted to strengthen the 1739 Act, and reach new forms of lottery. The Act stated:

> And whereas a good and wholesome law was made in the twelfth year of the reign of his present majesty King George the Second, instituted And act for the more effectual prevent-

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[272] *Id.* at Paragraphs II, III and IV (emphasis added).

[273] Throughout the eighteenth century, Parliament continued to employ public lotteries to raise money for public projects. *See* 17 Geo. II c. 18 (1744); 17 Geo. II c. 32 (1744).

[274] 13 Geo. II c. 19 (1740).

> ing of excessive and deceitful gaming; but contrary to the true intent and meaning thereof, some fraudulent and deceitful games have been invented, and a certain game called Passage is now daily practiced and carried on, to the ruin and impoverishment of many of his Majesty's subjects; it is therefore hereby enacted and declared, That the said game of passage, and all and every other game and games invented or to be invented with one or more dice, or with any other instrument, engine, or device in the nature of dice, having one or more figures or numbers thereon (backgammon and the other games now played with the backgammon tables only excepted) are and shall be deemed to be *games or lotteries by dice*, within the intent and meaning of the said in part recited act."[275]

Likewise, in 1802, Parliament again acted to include the newest gaming inventions in the ban on "any game or lottery."[276] Parliament declared:

> That . . . no person or persons whatsoever shall publickly or privately keep any office or place to exercise, keep open, show of expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, *any game or lottery* called Little Goe, *or any other lottery whatsoever* not authorized by Parliament.[277]

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[275] *Id.*

[276] 42 Geo. III c. 119 (1802).

[277] *Id.* (emphasis added). The courts interpreted the statutory language, "or by any other way, contrivance or device whatsoever" literally, and did not confine the meaning of lottery to a scheme involving the sale and drawing of tickets. It was clear that *any* scheme under which a prize was bestowed to someone paying for a chance to win was considered to be a lottery. *See* Jeffs v. Blackmon, 45 Eng. Rep. 378, 380 (1864) (where a theater operator was convicted under the 1802 statute for the random distribution of prizes among the audience at the end of a show). The tickets had been sold under the advertisement that lavish gifts would be "impartially divided amongst the audience, and given away," and the proprietor called out seat numbers at will (not by a drawing) to identify the recipients. *Id.* The court was unimpressed with the argument that the discretionary nature of the prize distribution rendered the scheme not a lottery:

> In my opinion, the mere selecting certain persons by calling out numbers, so far from not being a lottery which is intended to be prohibited, is somewhat worse, for the proprietor might call out the numbers of such seats only as were occupied by persons acting in collusion with him. I am

Clearly a lottery was understood to be a gaming activity which could be carried on by a variety of "contrivances" or "devices," and was not confined to the sale of tickets, the common form of a public lottery. The state practiced a highly stylized and stereotyped version of a lottery, and forbade private persons unauthorized by statute from conducting a lottery *in any form*. The laws set forth above show beyond any doubt that, just because the state habitually employed one form of lottery, there was no intent to confine the legal definition of "lottery" to that form only. The terms "game," "lottery," "gaming," "gambling," "betting," "wagering" and "lottery" had overlapping and related meanings, each used to describe private activities which promoted risk-taking and the resultant loss of money, leaving those who could least afford to lose it impoverished. Like all its predecessors which used the terms "game" and "lottery" interchangeably, and described a large variety of gambling practices (cards, dice, etc.), the 1802 Act recited the public policy against the taking of "great sums of money from servants, children, and unwary persons, to the great impoverishment and utter ruin of many families.[278]

In 1845, Parliament finally attempted to disentangle the mass of laws dealing with games and sports themselves from laws pertaining to gaming and wagering as a separate generic activity.[279] All gambling contracts were outlawed.[280] Howev-

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> clearly of opinion that the transaction is a mere device for carrying into effect that which the legislature has expressly said shall not be done.

Id. at 380.

[278] 42 Geo. III c. 119 (1802).

[279] Shortly before, Parliament had passed an act dealing with the giving of securities in consideration of a gambling contract. 5 & 6 Will. IV c. 41 (1835). Horseracing, apart from betting, was legalized by 3 & 4 Vict. c. 5 (1840). In 1844, Parliament began a serious and complete overhaul of gaming law. *See* 7 & 8 Vict. c. 7, c. 37 (1844). The 1845 Act was the final attempt to recodify and clarify the previous mass of statutory law, and to separate games of skill from games based on chance. 8 & 9 Vict. c. 109 (1845). The preamble to the 1845 Act reads: "Whereas the Laws heretofore made in restraint of unlawful Gaming have been found to no Avail to prevent the Mischiefs which may happen therefrom, and also apply to sundry Games of Skill from which the like Mischiefs cannot arise." *Id.*

The 1845 Act went on to outlaw all gaming and wagering contracts. *Id.* at er, even after the final abolition of gambling contracts in 1845, the older law was a reservoir from which to draw a definition of lottery *that did not require the formality of ticket sales*, and could apply to a transaction where the contribution of the individual contestant to a prize fund was highly indirect or minimal. Additionally, the English Courts clarified the role of chance in an activity alleged to be a lottery. In *Hall v. Cox*, the Queen's Bench held that "to constitute a lottery it must be a matter depending entirely on chance."[281]

What the combined jurisprudence of England and America shows is that, by the beginning of the twentieth century, it was clearly possible to have gaming which constituted a lottery, but not wagering even though in many instances an activity will constitute both. However in other instances an activity may be a lottery with fewer formal requirements than are necessary to constitute wagering (mutuality—though not parity of risk, etc.). A lottery has "bare bones" requirements that are far more simple than those entailed in a gambling contract. All that a lottery requires is the offering of a prize for a price on the issue of chance (lot), which, under English law, meant that the transaction had to be entirely governed by chance.

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§ 18. The Statute of Anne was repealed. "Gaming Houses," i.e., gambling houses, were subject to indictment, and even private clubs or places not open to the general public if they conducted any game "where the chances of any game are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed." *Id.* at § 2. The objective was, in part, to make judicial relief unavailable to any party to a betting contract, since the contract itself was illegal. This approach was not generally followed in America, where the Statute of Anne was retained by most states. The 1845 Act ended the pattern of regulating gambling by regulating or prohibiting the game. Parliament continued thereafter to punish gambling on sporting events while allowing the games themselves to continue. *See* 37 & 38 Vict. c. 15 (1874); 16 & 17 Vict. c. 119 (1853). The 1845 Act and its successors left it unclear how much of the older statutory law dealing with particular forms of gambling, such as a lottery, remained in effect. *See* Willis v. Young & Stembridge, 1 L.J.K.B. 448 (1907).

[280] *Id.*

[281] 1 Q.B. 198 (1899).

2. The "American Rule"

It remained for American jurisprudence to decide the role that chance must play in a transaction in order to render it a lottery. On this issue, the case of *People ex rel. Ellison v. Lavin* was a landmark in American law.[282] It was the first American case to reject the "pure chance" rule derived from English law, and was universally followed in other jurisdictions. As one commentator remarked of *Lavin*, "This case marked the end of the "pure chance doctrine" in the United States. Ever since, the "dominating element" test has prevailed. In some jurisdictions, statutes have been passed to this effect. *Hall v. Cox* is no longer the law anywhere.[283]

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[282] 71 N.E. 753 (N.Y. 1904). This approach actually agrees to a large degree with the English rule defining the role of skill. Even though the English cases followed a "chance only" definition of lottery, they were quick to disregard alleged skill unless skill was an actual rather than a theoretical possibility under the facts at hand. About the same time as *Lavin*, the English courts had held that so-called skill was irrelevant unless the actual participants in the alleged lottery could realistically be expected to acquire it. *See* 15 HALSBURY'S LAWS OF ENGLAND, *supra* note 243, at 301, 310 (discussing *Santongeli v. Neilson*, 3 F.J.C. 10 (1900)) (emphasis added):

> An automatic machine having several compartments into which a coin could be projected by the operator by means of a spring, a prize being obtained by lodging the coin in certain of the compartments, where skill, if acquired by the operator, would have contributed to success, *but where the circumstances were such that it was practically impossible to acquire it, was held to be a lottery.*

Thus, even under the restrictive English approach to lottery, an activity could still be a lottery where skill *could* affect the outcome, but realistically *would not* do so in fact.

[283] L.C. Thomas, Note, *Contests of Skill and Lottery Laws*, 23 VA. L. REV. 431, 434-35 (1937). Another leading case decided shortly after *Lavin*, *Stevens v. Cincinnati Times-Star Co.*, 73 N.E. 1058 (Ohio 1905), elaborated on the meaning of "chance," and its relationship to skill:

> [I]t should not be concluded that the term "lot or chance" implies that if any element of certainty or skill enters into the scheme it therefore relieves it of its character as a lottery or scheme of chance. Chance is something that befalls; the result of unknown or uncertain forces or conditions . . . . It is easily within bounds to conclude that, if *the dominating, determining element is one of chance*, that element gives character to the whole scheme.

Stevens, 73 N.E. at 1060-61 (emphasis added).

In short, the "American Rule" established after 1900 avoided the horrible complexities of the English law, and a common sense qualitative appraisal of an activity reduced the test to two simple questions about the roles of skill and chance: Is the result of an activity separable from the element of chance, so that skill can be determinative, at least in some cases? Or is the result *always* sufficiently affected by the operation of chance that chance *could* always account for the result? The answer would obviously be different for a tennis game than for a card game.[284] In fact, commentators have generally recognized that card games inherently involve a large element of the unknowable in any series of plays, so that it would be impossible to rule out the impact of chance in *any* conventional card game.[285] Thus, by the early twentieth century, American law contained a broader prohibition against lotteries than did English law.

Significantly, the court in *Lavin*, observed that the determination of the dominating element in a contest must focus on the actual facts involved in each case.[286] However, the way in which the court clarified the role of chance resulted in an interesting and unique twist to American law. The court distinguished the judicial evaluation of chance as a scientific or factual matter from the determination of chance viewed subjectively from the standpoint of the player or gambler.[287] The court noted that real-world events all have identifiable natural causes, since "the laws of nature are uniform, and . . . all phenomena or occurrences are the necessary effect of antecedent causes operating according to fixed laws."[288] Since nothing actually occurs by chance as an objective or scientific matter, the judicial evaluation of the role of chance in an individual case must take into account the state of knowledge of the gambler himself. It thus became clear that it is not the absence of some identifiable *actual* cause which makes an event dependent on chance, but rather it is the fact that the "antecedent causes" are unknown to the observer or participant, and therefore play no measurable role in the observer's conduct. Under the rule in *Lavin*, the very definition of chance was tied to the knowledge of the gambler. The court in *Lavin* stated:

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[284] Even at the time the "pure chance" definition of lottery was established in English law, the English authorities recognized that increasing the role of chance in any activity also increased the propensity to risk money on a wager, bet or lottery. "Gambling, as distinguished from Gaming, or playing, I take to mean an indulgence in those games, or exercises, in which chance assumes a more important character; and my object is to draw attention to the fact that *the money motive increases as chance predominates over skill.*" ASHTON, *supra* note 188, at 2 (emphasis added).

[285] *See* Charles Pickett, *Contests and Lottery Laws*, 45 HARV. L. REV. 1196, 1217 (1932):

> Where judgment must be exercised by the participants, but they are without sufficient data to exercise an informed judgment, the contest is a lottery . . . . Contests in which skill at cards determines the receipt of the prize fall into much the same category. In a limited number of deals, even a novice at bridge has the chance of surpassing an expert"s score. An extensive series of deals will eliminate players of inferior abilities, but in any finite number, the luck of the cards is the decisive factor as between players of the same caliber. Chance is therefore the dominant element.

Id. (footnotes omitted). It is interesting to note that English law after 1845 outlawed a wager placed on a card game *regardless* of the mixture of skill and chance involved. What prevented the contest in *Hall v. Cox*, discussed above, from being an illegal contract of gaming or wagering was the fact that the contestant did not put up a stake. *See supra* note 281 and accompanying text. What prevented it from being a lottery under the late nineteenth century English view was the fact that *some* skill was involved. *See supra* note 281 and accompanying text.

> But, though nothing occurs in the world as a result of chance, the occurrence may be a matter of chance to the observer from his ignorance of antecedent causes or of the laws of their operation . . . . Therefore, that may be a matter of chance to one man which is not a matter of chance to another, and with different men the chances of the occurrence of any event may differ greatly. It may be said that an event presents the element of chance so far as after the exercise of research, investigation, skill, and judgment we are unable to foresee its occurrence or non-occurrence, or the forms and conditions of its occurrence.[289]

This practical and fact-based approach to deciding the issue of the predominance of chance or skill is an integral part of the "dominating element" rule. Justice Holmes employed his typical epigrammatic brilliance to sum up the American rule two decades after *Lavin*: "What a man does not know and cannot find out is chance as to him, and is recognized by the law as chance."[290]

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[286] *Lavin*, 71 N.E. at 754.
[287] *Id.*
[288] *Id.*
[289] *Id.*

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[290] Dillingham v. McLaughlin, 264 U.S. 370, 373 (1924). This subjective approach to defining the role of chance is the same approach used by the English courts under the "pure chance" rule. Skill will not be counted unless a participant is likely to have it, though the English rule requires the chance to be the sole cause of the gambler's behavior, rather than an operative ingredient inseparable from the result of the gambling transaction, as under the American rule. Later, *McKittrick v. Globe-Democrat Publ. Co.*, 10 S.W.2d 705 (Mo. 1937), clarified the subjective element in the definition of chance introduced in *Lavin*. The court in *McKittrick* followed the approach in *Lavin* which focused on the actual skill a player may be expected to possess versus the hypothetical skill of the expert. *McKittrick*, 10 S.W.2d at 718. The court in *McKittrick* observed that the factual context of an alleged lottery is significant, stating:

> [I]f some abstruse problem comparable to the Einstein theory were submitted to the general public in a prize contest on the representation that no special training or education would be required to solve it, the contention could not be made, after contestants had been induced to part with their entrance money, that the element of chance was absent because there were a few persons in the world who possessed the learning necessary to understand it.

Id. The Court also defined "lottery" under the state Constitution and law:

> The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. It is conceded that the first two of these elements were present in the "Famous Names" contest, here involved, the sole question being whether the third element-chance-was there. In England and Canada, where the "pure chance doctrine" prevails a game or contest is not a lottery even though the entrants pay a consideration for the chance to win a prize, unless the results depend *entirely* upon chance. In the United States the rule was the same until about 1904; but it is now generally held that chance need be only the *dominant* factor. Hence a contest may be a lottery even though skill, judgment, or research enter thereinto in some degree, if chance in a larger degree determine the result.

Id. at 713 (citations omitted).

This case is an accurate statement of the American "dominating element" rule, which by 1937 had become almost universal in America. The court went on to define the meaning of "dominating" under the American rule:

> It is impossible to harmonize all the cases. But we draw the conclusion from them that where a contest is multiple or serial, and requires the solution of a number of problems to win the prize, the fact that skill alone will bring contestants to a correct solution of a greater part of the problems does not make the contest any less a lottery if chance enters into the solution of another lesser part of the problem and thereby proxi-

Thus, under the American rule, the inability to separate the result of any transaction from the element of chance is the key characteristic of a lottery. If a game involves the patron in making a decision that would require a knowledge of facts which are unknown to him, the fact that some other persons may know of those facts, or the fact that they might actually be determined scientifically is not dispositive. In *Hudelson v. State*,[291] a contest to guess the number of beans in a jar was declared to be a lottery.[292] The Court held that "[t]he number of beans in the globe could be nothing else than a matter of guessing."[293] There was no contention that these factors could not be determined, only that it was not likely that anyone playing in the contest would know them. Likewise, the possession of skill should enable the skilled person in a true game of skill

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> mately influences the final result. *In other words, the rule that chance must be the dominant factor is to be taken in a qualitative or causative sense rather than in a quantitative sense.*

Id. at 717 (emphasis added).

In South Carolina, the three circuit courts which have dealt with the application of lottery laws to video poker have followed the three part definition of lottery. Ardis v. Ward, No. 93-Cp-24-152, slip op. (S.C. Ct. C.P. Greenwood County, July 6, 1994); Montjoy v. One Stop Abbeville, Inc., No. 93-CP_01-73, slip op. (S.C. Ct. C.P. Abbeville County, July 6, 1994); Bagwell v. Tollison, No. 91-CP-04-1784 slip op. (S.C. Ct. Ct. Anderson County, April 13, 1992). The South Carolina Supreme Court held that the three part test for determining a lottery is the standard "predominating element" test rather than the "pure chance rule." Darlington Theaters, Inc. v. Coker, 2 S.E.2d 782, 786 (S.C. 1939) (emphasis added) (describing a lottery as involving consideration for a prize and "a method *involving* chance"). This case was overruled *sub silentio* by *Johnson v. Collins Entm't Co.*, 508 S.E.2d 575 (S.C. 1998).

The "pure chance" rule of *Hall v. Cox*, was explicitly followed in America in only one decision, *United States v. Rosenblum*, 121 F. 180 (S.D.N.Y. 1903), though some earlier state courts had applied what amounted to the same thing. *See* People v. Elliot, 41 N.W. 916 (Mich. 1889); Quatsoe v. Eggleston, 71 P. 66 (Or. 1903). At least one state adhered to the "pure chance" rule for a time, eventually adopting the "predominating element" test, and then returning to a "pure chance" rule. *See* State v. Schwemmler, 60 P.2d 938 (Or. 1936) ("pure chance"); Multinomah County Fair Ass'n v. Langley, 13 P.2d 354 (Or. 1932) ("predominating element"); National Sales Co. v. Manciet, 162 P. 1055 (Or. 1917) ("pure chance"). *See generally* Willard W. McInturff, Note, *Lotteries—Nature and Elements—Regulation*, 16 OR. L. REV. 164 (1937).

[291] 94 Ind. 426 (Ind. 1884).

[292] *Hudelson*, 94 Ind. at 427.

[293] *Id.* at 426.

to win with regularity. The Superior Court of New Jersey, in *O'Brien v. Scott*,[294] pointed out that during the trial level proceedings of this case, a Princeton mathematics lecturer testified that:

> [g]ames of skill and chance are set off by two fundamental criteria. First, an expert or skilled player can win *a substantial majority* of games of skill from a novice or unskilled player; and second, in a game of skill which is won by the lowest score, an expert or skilled player will make, on the average, *a substantially lower* score than a novice or unskilled player. Neither of these results are true in a game of chance.[295]

The same approach that appeared in the state cases above was followed in the federal courts as well. In *Johnson v. Phinney*,[296] the Court of Appeals for the Fifth Circuit sustained the decision of the district court to treat the issue of the operation of pinball machines as a lottery as a matter of law, despite Defendant's evidence that skill plays a part in the game:

> [W]e think he was also correct in concluding as a matter of law that the pinball machines operated by appellant constitute a lottery and not submitting that issue to the jury. As we

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[294] 89 A.2d 280 (N.J. 1951).

[295] *O'Brien*, 89 A.2d at 284; *see also* Howard Newcomb Morse, *The Dominant Element Rule*, 58 DICK. L. REV. 394 (1954).

Thus, in *Contests of Skill and the Lottery Laws*, the author sets forth a summary of the American "dominating element" rule as it stood in 1937, by which time it had become the majority rule in America:

> It is submitted that the following are requisite to a contest of skill: (a) There must be a clear possibility of exercising skill. (b) Contestants must have the opportunity of exercising skill. (c) There must be a definite standard of skill, known to the contestants. (d) Final results must be determined by this standard, and prizes awarded accordingly.

Thomas, *supra* note 283, at 436 (citations and footnotes omitted). The author notes that element (c), a standard known to the contestants, is taken to mean "a skill within the reach of the average person." Thomas, *supra* note 283, at 438. For other leading state cases applying and discussing the standard American rule, see Commonwealth v. Laniewski, 93 A.2d 215 (Pa. 1953); State v. Hudson, 37 S.E.2d. 553 (W. Va. 1946); State *ex rel.* Green v. One 5 Cents Fifth Inning Baseball Machine, 3 So. 2d 27 (Ala. 1941); State v. Dora, 198 A. 573 (Conn. 1938); State v. Lindsey, 2 A.2d 201 (Vt. 1938);.

[296] 218 F.2d 303 (5th Cir. 1955).

> have stated, the evidence undeniably showed the predominance of chance; and even if it be true, as argued by appellant, that this was a fact question, we are of the opinion that the only reasonable conclusion is the one reached by the trial judge.[297]

In describing the standard employed to determine chance, the court in *Johnson* noted:

> With respect to the element of chance, the authorities are in general agreement that if such element is present and predominates in the determination of a winner, the fact that players may exercise varying degrees of skill is immaterial, and the game or device is a lottery.[298]

It has long been recognized in this country that the principal vice of lotteries is the fact that they operate most successfully *because of* the general ignorance of abstruse rules and the inaccessible nature of the skills which might affect the outcome of a game. Justice Grier observed in *Phalen v. Virginia*[299] that this

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[297] *Johnson*, 218 F.2d at 307.

[298] *Id.* at 306; *see also* United States v. Marder, 48 F.3d 564 (1st Cir. 1995) (where the district court applied the "predominating element" rule to video poker gambling). The court of appeals affirmed the district court's use of the rule, since video poker operates in a manner that inherently reduces the role of skill. *Id.* at 569. The court stated:

> [O]ne hand of video poker took from two to ten seconds to play. Unless a player has a mind like a computer, this is hardly sufficient time to use poker skills . . . . Obviously, there were a great many more losers than winners. Skill might have played a role in the video poker games operated by defendant, but it did not dominate.

Id. The Court in *Marder* also acknowledged the fact that the random selection of replacement cards for a player's discards made the process one of chance. *Id.*

[299] 49 U.S. 163 (1850). *Phalen* is part of a long line of United States Supreme Court cases sustaining state prohibitions and regulations on lotteries against the argument that such prohibition or regulation applied to an enterprise conducted with state approval amounted to an unconstitutional interference with the obligations of a contract. In *Stone v. Mississippi*, 101 U.S. 814 (1879), the Supreme Court dealt with a Mississippi Constitutional prohibition on lotteries almost identical to that in the South Carolina Constitution. The Court rejected the Defendant's argument that a previously granted state charter to a corporation which ran a lottery made it unconstitutional for the State to prohibit this activity. The Court stated:

> All agree that the legislature cannot bargain away the police power of a

characteristic of a lottery was what accounted for its widespread prohibition in the law:

> Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole

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> State . . . . Neither can it be denied that lotteries are proper subjects for the exercise of this power . . . .
>
> If lotteries are to be tolerated at all, it is no doubt better that they should be regulated by law, so that the people may be protected as far as possible against the inherent vices of the system; but that they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt.

Id. at 818.

The predominant form of convenience gambling in the United States, video poker, would still be predominantly governed by chance *even if there were* a set of rules and principles which, if learned and mastered by a hypothetical player with great skill and learning, would allow that player to consistently win rather than lose. The transaction would still be a lottery if those rules were unknown to most players, or knowable by only the most learned. If a player could be expected to learn the rules of a game and consistently win more than he lost, skill could arguably be said to predominate over chance. In fact, video poker is not subject to such rules, where skill could predominate over chance. All evidence has shown that any such expertise is in fact confined to those with highly specialized special skill or training, and that even with such skill the player can only hope to influence the outcome over a long time and an extraordinarily large number of plays. Expert testimony offered by defendants in *Johnson v. Collins Entm't Co.*, *supra*, estimates that approximately 14,000 games would be required to realize the benefits of skill. Even then, the skill only has a moderate effect on the outcome, and may lessen the loss rate of players by a small percentage. In short, skill may mitigate the overwhelming predominance of chance, but does not eliminate that predominance.

In the second quarter of the twentieth century in America, it was universally recognized that the form in which the three elements of a lottery appear is immaterial.

> Nor is any particular method of operation indispensable to the existence of a lottery. . . . The situation is not affected materially even if tickets are dispensed with entirely. . . . In the last analysis, every aspect of the scheme is irrelevant, so long a people are induced to pay consideration for the possibility of receiving a prize distributed by chance. The superficial differences between organized lotteries and advertising contests do not affect the question of legality, for those differences concern only the method of operation (the absence of tickets and a drawing) and the motive of the promoter (advertisement of business). But these variations in form and substance are legally irrelevant, as they do not have anything to do with the all-important elements of consideration, chance and prize.

Pickett, *supra* note 285, at 1200-01:

> community: it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.[300]

Thus, by the early twentieth century, it was clear that the parallel course of English and American law had settled the classifications and definitions of gambling forms, with identifiable differences between the law of England and the United States. First, English and American law both define a lottery as a more broad and inclusive term than "wagering" or "betting." In England, a wager or bet is defined as:

> [A] wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that the other shall pay and hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it win or lose, whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known. If either of the parties may win, but cannot lose, or may lose but cannot win, it is not a wagering contract.[301]

In legal terms, a wager or bet is a contract, and an agreement does not become a wager or bet until a contract is formed. From its formation, the outcome is contingent upon a future uncertain event. In contrast, a lottery *does not* require the promoter of the lottery to have anything at stake, or have a contract with the participants in the lottery, but rather only requires that the promoter of the lottery set up a scheme which offers winnings contingent upon chance.[302] The promoter of a

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[300] *Phalen*, 49 U.S. at 168.

[301] Carlill v. The Carbolic Smoke Ball Co., 2 Q.B. 484, 491 (1892). This is why Parliament repealed the Statute of Anne in the same enactment in which it outlawed all gaming and wagering *contracts* in 1845. *See* Gaming Act, 1845, 8 & 9 Vict., c. 109, §§ 18 (Eng.) (stating "all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void."). It was deemed impermissible to allow people to use the courts to recover in connection with an illegal contract. This is why, even after 1845, and even into the twentieth century, people were regularly sued or prosecuted for running lotteries *as defined by the pre-1845 law*, even in cases where no wager or bet as defined by law was involved.

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[302] "In traditional legal idiom, a wager or bet is known as a gaming contract." A DICTIONARY OF MODERN LEGAL USAGE 380 (2d ed. 1995); *see also* CYCLOPEDIC LAW DICTIONARY, *supra* note 190, at 444 (describing a "gambling contract" as "[o]ne in which the parties in effect stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of such gain or loss").

Some authorities draw a minor distinction between "gaming" and "betting," but only as to the subject which provides the element of chance upon which the contract hinges, i.e. whether it is a game or some other event. *The Cyclopedic Law Dictionary* distinguishes "gaming" from "betting" in this way: "Gaming is synonymous with gambling. It is to be distinguished from 'bet' or 'wager' which may be laid upon games, or things not games." CYCLOPEDIC LAW DICTIONARY, *supra* note 190, at 446 (citations omitted). Gaming is a wager or a bet on games, while a wagering or betting contract can also be made on matters or events other than games. The non-game subjects upon which wagers or bets have been made is literally without limit. Cases have involved bets on such things as the length of Napoleon Bonaparte's remaining life, *Gilbert v. Sykes*, 54 Eng. Rep. 1045 (K.B. 1812), to a case tried before Lord Mansfield in 1777 pertaining to a bet on the sex of the Chevalier D'Eon, former ambassador to England from the Court of France, *Da Costa v. Jones*, 98 Eng. Rep. 729 (K.B. 1777). In England, the Chevalier was widely believed to be a man, but was alleged by the plaintiff to actually be a woman. The plaintiffs evidence was the testimony of a French surgeon and a former confidant of D'Eon. *See also* Evans v. Jones, 91 Eng. Rep. 34 (Exch. Div. 1839); Bray v. Randall, 76 Eng. Rep.1388 (C.P. 1801). Wagering or betting contracts were disfavored by the courts, but were not prohibited by law until the Act of 8 & 9 Vict. (1845), discussed herein.

The Cyclopedic Law Dictionary illustrates the distinction between wagering or betting and a lottery:

> A lottery has been distinguished form a mere bet or wager in that the latter is executory on both sides, and determined by an independent event; while in case of the former, a price is paid for a chance of a prize, and it is determined by the manager of the game, according to a prearranged scheme, whether he who pays the money is to have a prize.

CYCLOPEDIC LAW DICTIONARY, *supra* note 190, at 627. In contrast to a bet or wager, a lottery is "a *scheme* whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value or nothing *as some formula of chance may determine*." CYCLOPEDIC LAW DICTIONARY, *supra* 190, at 627 (emphasis added).

"The ordinary definition of a lottery is the distribution of prizes by lot or chance." Hardwick v. Lane, 1 K.B. 204, 206 (1903); *see also* Willis v. Young & Stembridge, 1 K.B. 448, 451 (1906) ("[A] distribution of prizes by lot or chance"); Gatty v. Field, 9 Q.B. 431 (1846); Alport v. Nutt, 1 C.B. 974 (1845).

For a discussion of the distinction between lotteries and unlawful gaming, see *Queen v. Hobbs*, 2 Q.B. 647, 655-58 (1889). This case illustrates how the concept of lottery was regarded as broader, not narrower, than the concept of unlawful gaming. *See Hobbs,* 2 Q.B. at 655-58. The court there dealt with the proprietor of a public house who had allowed his patrons to purchase tickets which entitled them at a later time to draw another ticket bearing the names of horses at racing events. *Id.* The parties drawing the name of the winning or most successful horses would split the pot, the party drawing the winner getting the most, the party drawing the number of the horse in second place getting somewhat less, and so on until the pot was distributed. *Id.* The proprietor made no profit himself. *Id.* The court held that the indictment of the proprietor was defective under the gaming acts, since the defendant had not actually entered into a wager with his patrons, and noted that what the defendant had done was actually a lottery:

> I am inclined to think that what took place did in fact amount to a lottery, and nothing but a lottery; and I am quite clear that in no sense was it a betting transaction . . . It is clear that the event or contingency in respect of which the money was to be paid was not the horse race, but the drawing, and, as has been pointed out, that drawing would be equally good if it took place after the race had been run. That seems to show that the promise to pay was not dependent upon the event of the race, but on the event of the drawing. Therefore, in my opinion, this transaction does not fall within the second part of s. 1 of the Betting Act of 1853.

Id. at 655-57.

In short, the proprietor had not made a bet with any of the patrons, since he did not enter into any agreement with them whereby each party could lose or gain dependent on the outcome of a future uncertain event. *See id.* But he had made it possible for them to venture sums on a transaction determined by chance, and thus had "set up" a lottery. *Id.*

The breadth of the offense of conducting a lottery as opposed to wagering or betting appears in practically every discussion of the subject.

> Setting up or maintaining a lottery is also a statutory offense, and none the less so because set up under a grant from a foreign government. So also is selling by lot, or setting up or maintaining any place for the purpose . . . . Making proposals of schemes for lotteries dependent upon the chances of a public lottery authorized by Act of Parliament is also an offense. Selling tickets, chances, or shares in any English or foreign lottery, or delivering or causing them to be delivered, or procuring or delivering any tickets in any foreign or any pretended foreign lottery, or any undertaking in the nature of a lottery . . . are offenses.

15 HALSBURY'S LAWS OF ENGLAND, *supra* note 243, at 302 (citations omitted, emphasis added).

Though it is usual for a lottery to involve some contribution by participants (a price), this requirement is not essential to all the participants in the formation of a lottery. It is not usually necessary to analyze the situations in which an enterprise may be a lottery prior to the investment of consideration by the participants, since all participants in a lottery have normally contributed money as a precondition for participating in the lottery.

lottery may or may not consummate a contract with one or more of the participants, and may or may not derive a profit from the lottery itself. Historically, the law has treated the particular means of offering or conducting a lottery as irrelevant.[303] Under a conventional public lottery, a drawing would be held by the lottery operator, who would determine a winning number that corresponded with the number on one of the tickets previously sold. However, these formalities are not what makes such an activity a lottery. Rather, it is the essential features possessed by such a ticket sale transaction that make it a lottery, so that other formalities and methods may also consti-

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Additionally, it is not necessary that the setting up of a lottery require the sale of tickets, though it often takes that form. What a lottery *does* require are the three elements of consideration, chance and prize. In *Contests and Lottery Laws*, the author analyzes the application of lottery laws to a wide variety of schemes other than those involving ticket sales or a drawing. Pickett, *supra* note 285. The cases discussed therein leave no doubt about the formal requirements of a lottery in American law, or about the necessity of any particular formal arrangement for conducting a lottery:

> Not only are these three elements the necessary conditions of a lottery, but their joint presence is enough to vitiate a scheme, no matter how innocent or attractive it is otherwise . . . . As the gist of the offense is the adverse effect on the public, not the wrongful intent of the promoter, equally laudable purposes have failed to save schemes which satisfied the test of prize, chance, consideration.
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> . . . .
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> *Variations in form are as immaterial as variations in substance.* Of course, it is of no importance what the scheme is called; as the courts put it, it is the game and not the name which counts. *Nor is any particular method of operation indispensable to the existence of a lottery. For example, a formal drawing by lot is not needed*, although lotteries have often been associated with wheels of chance and drawings by lot, as the very term indicates . . . . In the last analysis, every aspect of the scheme is irrelevant, so long as people are induced to pay consideration for the possibility of receiving a prize distributed by chance.

Pickett, *supra* note 285, at 1200-01 (emphasis added, citations and footnotes omitted).

[303] For a leading English case that illustrates the application of lottery laws to machines or devices which do not involve ticket sales or drawings, see *Fielding v. Turner*, 1 K.B. 867 (1901).

Likewise, in *Jeffs v. Blackmon*, 45 Eng. Rep. 378, 380 (1864), a theater operator was convicted under the 1802 statute for holding a lottery by randomly distributing prizes among the audience at the end of a show. *Id.* No tickets were drawn, and the proprietor simply called out seat numbers at will. *Id.*; *see also* Willis v. Young & Stembridge, 1 L.R.-K.B. 448 (1907).

tute a lottery within the definition of the law. To understand the difference, it is necessary to understand how English and American jurisprudence have distinguished between gaming, wagering, betting and a lottery. What all the English cases show is that, though it is clearly possible to envision gaming which constitutes a lottery but not a wager, in many situations an activity will be both, and in some others an activity may be a lottery with fewer formal requirements than are necessary for a wager, which requires mutuality—though not parity—of risk. All that lottery requires is the offering of a prize for a price with the winning of the prize determinable on the issue of chance (lot).[304] On the other hand, a wager or bet *is* a contract, and is treated by the law as such.[305] A lottery, involves prohibited *activity*, which may or may not lead to or involve a contract.[306] Thus, the operation of a lottery requires proof of fewer formal elements than are required to prove an unlawful wager or bet. The fact is that both wagering and lottery share the essential elements of consideration, chance and prize, but a transaction can still be a lottery without amounting to wagering. The essential difference is that a lottery is a type of gambling that is designed to operate on an extensive scale, providing an opportunity for gambling on a mass basis to all comers who will tender their consideration for a prize to be determined by a chance event. Instead of being limited to certain contracting parties who have customized their wager or bet to depend on any chance event that suits them, a lottery consists of an open gambling opportunity made available to all comers by its promoters. For this reason, the social costs and damage caused by lotteries have often been recognized as greater than those caused by private wagering.

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[304] *See* Willis v. Young & Stembridge, 1 L.R.-K.B. 448 (1907). In that case, the defendant, accused of running a lottery, had no privity of contract with any of his patrons, nor was it deemed necessary that any given patron make any contribution to the scheme (such as a stake or amount at risk, which is required for a wager). *Willis*, 1 L.R.-K.B. at 448; *see also Barclay v. Pearson*, 2 Ch. 154, 162 (1893) ("According to the Lottery Acts, the question does not depend upon the absence or presence of a mechanical lot; but what is aimed at is the staking of money upon a chance."). This definition of a lottery appears throughout both the legal and the popular literature on the subject. For a more modern repetition of this definition, see Morton J. Simon, *Contests vs. Lotteries*, ADVERTISING AGENCY, Apr. 1951), at 57, *reprinted in* HERBERT L. MARX, JR., GAMBLING IN AMERICA 79 (1952):

> A lottery has been defined as a "chance taken for a consideration in the hope or expectation that something will be obtained of greater value than that which is given up and with full knowledge that nothing at all might be obtained." If these three requirements are present, the scheme is a lottery.

The author also gives a broad definition of "consideration": "[A]ny benefit moving to the advertiser or any inconvenience suffered by the contestant." *Id.* The employment of a drawing at which a participant must be present to win is classified by this writer as consideration, since it involves an inconvenience to the participant. *Id.; see also* Morris Ploscowe, *The Law of Gambling*, 269 ANNALS AM. ACAD. POL. & SOC. SCI. 1-8 (1950), *reprinted in* HERBERT L. MARX, JR., GAMBLING IN AMERICA 142 (1952) ("A lottery has been defined as a scheme for the distribution of property by chance among persons who have paid or agreed to pay a valuable consideration for the chance. Three elements, therefor, must be present for a lottery: (1) a prize, (2) distribution of the prize by chance, (3) consideration.").

[305] Numerous cases have sustained the finding that a particular defendant had not engaged in any unlawful wagering or betting, but had been guilty of running a lottery. This is the reason why there were numerous lawsuits and criminal prosecutions for running a lottery even after the reform of gaming law in Eng-

To say that the term "gambling" includes the term "lottery," or that a lottery is merely one type of gambling, is unhelpful. It may be said more accurately that the term "lottery" can include various forms of gambling, and is not dependent upon any one form.[307] In common parlance, gambling entails

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land in 1845, where all wagering or betting contracts not specifically authorized by statute were declared illegal. The prohibitions on lotteries in the pre-1845 law continued to support prosecutions even where no wagering or betting had taken place.

[306] This is why the typical lottery statute prohibits "setting up lotteries," and not merely consummating a contract with a participant. S.C. CODE ANN. §16-19-10 (1985) (where the statute punishes those who "set up or expose to be played, drawn or thrown at any lottery . . . ."). It is the offering of a lottery, as defined by the three elements of prize, chance, and consideration, and not the sale of tickets, which is the essence of the offense. In fact, typical statutory definitions of a lottery do not require a participant to purchase a ticket, nor do they require that any payment at all be completed. *See* N.Y. PENAL LAW § 1370 (1909) (emphasis added) ("A lottery is a scheme for the distribution of property by chance, among persons who have paid *or agreed to pay* a valuable consideration for the chance, whether called a lottery, raffle, of gift enterprise *or by some other name*.").

[307] *See* Lee v. City of Miami, 163 So. 486, 488 (Fla. 1935) (emphasis added) ("In law, the term 'lottery' . . . embraces *all schemes* for the distribution of prizes by chance, such as policy playing, gift exhibitions, prize concerts, raffles at fairs, etc., *and includes various forms of gambling*.").

a contract, and a lottery entails a scheme.[308] It is essential for a gambling contract that both parties stand to gain or lose upon the happening of the uncertain event. A lottery is different, and can involve various forms of gambling or exist without them.

Gambling embraces every private contract whereby two or more people mutually risk an agreed amount upon the occurrence of any uncertain future event. There *may or may not* also be a lottery. A lottery is the general and unrestricted presentation of certain key elements of gambling (consideration, chance and prize) to any and all willing participants, or any and all from some identifiable group (theater patrons, purchasers of a newspaper, etc.). A gambler says, "I will risk so much with you on an uncertain future event, provided you do the same. Let us make a contract to that effect." On the other hand, the lottery promoter says, "My door is open; I will promise a chance for a specific reward to anyone who puts up consideration for a chance to win it." The promoter of the lottery may or may not stand to lose or gain, as a mere gambler always does. Therefore, a transaction may be a lottery without being a gambling contract, and vice versa.[309]

Additionally, under American law, the role which chance must play in the conduct of a lottery is less than that required under English law. In America, the rule is firmly established that chance must only be the predominating element in a transaction, and not the sole determinant of the outcome.[310]

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[308] *See supra* note 302 and accompanying text.

[309] *See supra* note 302 and accompanying text.

[310] *See supra* notes 282-95 and accompanying text. In summary, the law of lotteries (i) *does not* require privity of contract between the lottery operator and a patron; (ii) it *does not* require that the operator of a lottery have a stake at risk or derive any profit directly from the lottery; (iii) it *does not* require that the lottery be conducted in any particular form, i.e., ticket sales or drawings. The law of lotteries does not even require that all participants in the lottery have any stake in it, or any potential loss which could result from it. What the law defines as a lottery, in its purest form, is the offering of a prize for a price, with the outcome involving chance in the manner prescribed by applicable law. A bet or wager *does* require that all involved parties place money or property at risk, and it *does* require privity of contract between all participants. *See* 15 HALSBURY'S LAWS OF ENGLAND, *supra* note 243, at 266, 299-300 ("He who organizes such a scheme may or may not be a party to the agreement between the adventurers, so

The broad definition of lottery in English and American law means that every state code or constitution is a potential weapon for anti-gambling forces. If the language of the state statute or constitutional provision is broad enough to correspond to the classic American definition, then the Statute of Anne or some similar remedy may exist for gambling losses.[311] Moreover, if this state law furnishes a violation of a lottery or gambling rule criminally, RICO may provide a means for recovery of treble damages and attorneys fees.

III. RECOVERY OF GAMBLING LOSSES UNDER RICO

A. The Structure of a Civil RICO Action

The conduct of gambling in violation of any state prohibition of a private lottery, as well as the violation of any other state gambling law, may serve as the basis for a civil RICO action, provided certain conditions are met. To evaluate the usefulness of RICO for recovery of gambling losses, it is helpful to generally discuss the nature of any civil RICO action.[312]

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that in considering whether a lottery is set up or maintained it is unnecessary to consider whether or not the organizer is to make a profit out of the subscriptions.").

As we shall see later, it is immaterial whether the funds involved in a lottery come from a pool contributed by the participants or from some other source. "[I]t is not essential that the fund out of which the prizes are provided should consist only of sums contributed by the adventurers. Nor does the fact that every adventurer in any event obtains some or even full value for his subscription prevent the scheme from being a lottery." 15 HALSBURY'S LAWS OF ENGLAND, *supra* note 243, at 266, 299-300.

[311] Where state statutory or constitutional provisions employ descriptive terms other than "lottery" or "lotteries" (such as "games of chance"), this arguably constitutes a narrowing of the broad definition of a lottery as a matter of legislative or constitutional interest. *See* Eisenrauch, *supra* note 9, at 567-70.

[312] *See generally* 18 U.S.C. § 1961 et seq. (2000). In RICO, Congress dealt with repeated and ongoing violations of state and federal criminal laws in a new way. Congress recognized that violation of these laws by groups of people posed a different problem than violation of one of those laws by an individual. The pathology of "group crime" called for special treatment beyond that provided by existing conspiracy laws. RICO dealt with situations where no single person involved in a group was necessarily responsible for the criminal acts accomplished by the group as a whole. Some were planners, directors or string pullers, and some were soldiers following orders. The carrying out of a criminal project by a group over an extended period of time made the violations of law more persistent

First, it is a mistake to assume that the essence of a RICO

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and harder to stop. Organized and ongoing group action also enabled the group to use otherwise legitimate business organizations as a vehicle for carrying out the group's criminal objectives. Much of the ongoing group activity did not involve what is called "organized crime," but rather involved persons cooperating with or using otherwise legitimate persons or entities to systematically and continuously violate state of federal criminal laws, often called "white-collar crimes." Congress concluded that the existing rules governing cooperative criminal action (accomplice and conspiracy rules) were inadequate to address the problem of planned, cooperative and ongoing operations which violated criminal law. *See* DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO 1-16 (2001); GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE (1992).

The mechanics of RICO are unique. First, Congress identified the illicit activity which it desired to regulate. It specified a select body of state and federal criminal laws which it felt were prone to violation by the collective and sustained action described above. RICO employs these selected state and federal criminal laws to define illicit activity (called "racketeering activity" and "unlawful debt collection" by RICO). RICO identifies these selected laws in Section 1961(1). Section 1961(1) specifies that the selected laws defining illicit conduct are of two types: (a) RICO Section 1961(1)(A): state laws on a particular subject, such as gambling, which are chargeable under state law and punishable by imprisonment of more than one year; (b) RICO Section 1961(1)(B): lists federal statutes. Section (A) is generic and descriptive, and does not specifically name or cite the state laws selected. Section (B) contains a specific list of federal statutes.

Congress then provided that the violation of those selected laws must be systematic in order to violate RICO. In Sections 1961 and 1961(5), it provided that the violations must constitute a "pattern," meaning at least two violations of a selected law. This distinguishes the RICO offense from a single violation of criminal law. RICO punishes the *repeated* violation of the selected laws as an offense separate from the offenses defined by those laws. Where the selected laws themselves may be violated by one single prohibited act, RICO adds a new penalty for their repeated violation.

In summary, Congress used its Constitutional authority over interstate commerce to help the states and the federal government pursue the policies contained in the selected body of state and federal criminal laws. Congress defined the ways in which the ongoing collective action violative of the selected laws must affect interstate commerce in order to constitute a RICO violation (independent of and in addition to those selected laws).

For the RICO plaintiff or prosecutor, the resulting formula is: (i) identify one or more of the state or federal criminal laws referred to in Section 1961(1); (ii) establish that the violation of the identified law is ongoing, and constitutes a "pattern" as defined by RICO Section 1961(5); and (iii) establish that the interstate connection is present as defined by RICO Section 1962(a), (b) or (c). In Section 1964, RICO provides criminal penalties in addition to those contained in the selected laws, and provides a civil action for anyone injured in their business or property by the violation of such laws. RICO also employs a newly defined conspiracy offense in Section 1962(d), and judicial decisions have incorporated existing laws dealing with accomplice liability contained in 18 U.S.C. § 2 (2000).

violation is a violation of state law. In fact, the essence of a RICO violation is the violation of a *federal* statute that prohibits the use of interstate instrumentalities to commit acts that are defined as illicit *by a limited and specific reference to state law*.[313] This reference to state law is used only to determine if the acts are potentially "chargeable" under state law.[314] The state law is not actually enforced, nor are any of the technicalities attending possible enforcement by the state relevant.[315] An independent *federal* policy is enforced in both criminal and civil RICO. The purpose of RICO is not to replicate or enforce state laws as written, to employ the same labels or classifications as those in state law, or to adopt the same preconditions for enforcement used by state law. Whatever methods a state may choose to employ to advance its own policies, the purpose of these federal predicate act statutes is to punish or make actionable *the use of interstate facilities* to engage in conduct of a type that is *potentially* chargeable under state law.[316] RICO supports and furthers the general policies embodied in select state laws as an *independent federal goal*, using *independent federal means*, free from the details of state law as it may apply in a state proceeding.[317] A court must determine if the type of conduct complained of "could be" subject to a criminal sanction under state law, a determination of law.[318] In fact, any administrative process or prosecutorial discretion that would proceed actual criminal charges under state law is irrelevant under RICO. To hold otherwise would make the use of state law under civil RICO dependent upon possibly lax or corrupt state officials. In *United States v. Conley*,[319] the district court observed, "One of the purposes of section 1955 [a RICO predicate act statute listed in RICO §1961(1)(B)] was to aid in the enforcement of gambling laws where state enforcement was disabled by corruption of state officials . . . "[320]

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[313] *See* United States v. Teplin, 775 F.2d 1261, 1265 (4th Cir. 1985); United States v. Loucas, 629 F.2d 989, 991 (4th Cir. 1980); SMITH & REED, *supra* note 312, at 2-4.

[314] 18 U.S.C. § 1961(1)(A)(2000); *see also Loucas*, 629 F.2d at 991.

[315] *See* United States v. Coonan, 938 F.2d 1553, 1564 (2d Cir. 1991).

[316] *Teplin*, 775 F.2d at 1265.

[317] The above considerations are relevant not only in the determination of RICO violations under the select federal predicate act statutes, but also they narrow the relevant causation issues for class-action purposes (discussed herein, *infra*). The various subjective factors concerning the plaintiffs' decision to gamble are irrelevant, and the actual common issue of fact becomes one of proximate causation from the acts constituting the RICO violation (i.e., the conduct of gambling as a manner violative of state law).

The Supreme Court has stated that RICO is proper "when federal law is applied in aid or enhancement of state regulation, and does not frustrate any declared policy or disturb the State's administrative regime . . . " Humana, Inc. v. Forsyth, 525 U.S. 299, 303 (1999).

[318] United States v. Aragon, 983 F.2d 1306 (4th Cir. 1993). It should be noted that "state of mind" ("reliance" or "inducement") is nowhere listed as a part of a

In short, RICO allows a state or federal judge to make an independent, preliminary subject-matter jurisdiction determination based on whether an alleged breach could be charged criminally under state law, completely independent of the competence, willingness or good faith of any state official. This is in keeping with Congressional recognition that the enforcement of gambling laws is often retarded by corruption.[321]

Thus, RICO incorporates numerous state and federal criminal statutes to supply a *definition* of wrongdoing, but does not entail the actual enforcement of state law as would occur in a state prosecution. Each act of wrongdoing establishes what

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RICO cause of action, nor is it normally required by any of the predicate act statutes pertinent to gambling claims, which are usually written in terms of prohibitions not qualified by any subjective factors. This distinguishes RICO gambling claims from those based on mail or wire fraud.

[319] 859 F. Supp. 909, 932 (W.D. Pa. 1994).

[320] *Id.* at 932 (*citing* United States v. Hurst, 951 F2d 1490 (6th Cir. 1991)). The district court in *Conley* rejected testimony from state licensing officials and the state attorney general that, despite the illegality of video gambling in Pennsylvania, the law had never been enforced, thus creating "de facto legality." *Id.* The court held such testimony "irrelevant," and stated that the complicity or laxity of state officials has no effect on the central question under RICO: *could* the alleged conduct be chargeable under state law. *Id.* at 935. The court additionally disposed of defendant's due process arguments that they had been misled by state officials, holding that some unequivocal and authoritative assurance from a responsible state official that defendant's conduct was legal would be required for a due process defense. *Id.; see generally* Cox v. Louisiana, 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959).

[321] The legislative history of RICO states that, "Congress finds that . . . illegal gambling enterprises are facilitated by the corruption and bribery of State and local officials or employees responsible for the execution or enforcement of criminal laws." S. Rep. No. 91-617, 91st Cong., 1st Sess. 16 (1969).

RICO defines as a predicate act of racketeering.[322] The *state* laws incorporated *directly* into RICO are described in RICO Section 1961(1)(A). These incorporated state laws deal with the subjects of murder, kidnapping, gambling, arson, robbery, bribery, extortion and dealing in narcotics or dangerous drugs. The federal laws incorporated into RICO are listed in RICO Section 1961(1)(B). Some of these federal laws in turn rely on state statutory laws.[323]

B. Proximate Cause in a Civil RICO Action for Gambling Losses

Gambling cases under civil RICO are rare. Since the majority of civil RICO cases involve mail and/or wire fraud, it is necessary to disentangle proximate cause analysis in fraud cases from that in the typical gambling case.

For a civil RICO action, a plaintiff must also show that the defendant's violation of a law qualifying as a RICO predicate act "proximately caused" his harm, that is his gambling losses.[324] Though the trier of fact must determine any otherwise undetermined actual fact in controversy (what the defendant did to violate the state's gambling laws), the determination of proximate or "legal" cause is for the court, "taking into consideration such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection."[325]

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[322] *See* 18 U.S.C. § 1961(1) (2000).

[323] For example, 18 U.S.C. § 1955 (1986) serves as a RICO predicate act statute as long as the underlying state law provides for a criminal penalty, even if this violation amounts to a misdemeanor under state law. Compare RICO § 1961(1)(a), under which gambling offenses at state law must be punishable by imprisonment for more than one year, with select federal laws listed in RICO § 1961(1)(B) (which includes 18 U.S.C. § 1955 (2000)). The latter does not require any particular term of imprisonment, but only requires that the gambling activity be in violation of state criminal law. It is important to note that the activity criminalized by state law does not require absolute prohibition of the activity in any form. Rather, a criminal violation may consist of exceeding the scope of a licensed, lawful activity, so long as it is punishable criminally. United States v. Wall, 92 F.3d 1444, 1453 (6th Cir. 1996).

[324] "Proximate cause" and "standing" are interchangeable concepts under RICO that stem from the requirement of RICO Section 1964(C) that a RICO plaintiff must suffer injury to his business or property "by reason of" a RICO violation. *See* SMITH & REED, *supra* note 312, at 6-62. The legal test for proximate cause is not perfectly uniform, and is affected by the particular criminal offenses upon which a RICO claim is based.

Thus, there is no single test for determining proximate cause under RICO. Rather, the court must look to the particular RICO cause of action asserted in applying the various policies behind the proximate cause rule. As Justice Scalia, concurring, stated in *Holmes v. S.I.P.C.*,[326]

> It seems to me obvious that the proximate-cause test and the zone of interests test that will be applied to the various causes of action created by Section 1962 are not uniform, but vary according to the nature of the criminal offenses upon which the causes of action are based.[327]

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[325] Chisolm v. TranSouth Fin. Corp., 95 F.3d 331, 338 (4th Cir. 1996). Much of the difficulty with applying a reliable proximate cause test stems from the fact that some of the considerations used by courts in making a determination of proximate or "legal" cause have nothing to do with physical or actual causation in fact. As one distinguished commentator has stated:

> Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury. Unlike the fact of causation, with which it is often hopelessly confused, this is primarily a problem of law . . . . Quite often this has been stated, and properly so, as an issue of whether the defendant is under any duty to the plaintiff, or whether the duty includes protection against such consequences. This is not a question of causation, or even a question of fact, but quite far removed from both; and the attempt to deal with it in such terms has led and can lead only to utter confusion.

WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 272-73 (5th ed. 1984); *see also* Holmes v. S.I.P. Corp., 503 U.S. 258, 268-270 (1992); Brandenburg v. Seidel, 859 F.2d 1179, 1189 (4th Cir. 1988). Under the Fourth Circuit authority cited above, the existence of proximate cause for RICO purposes is a question of law for the court.

[326] 503 U.S. 258 (1992).

[327] *Holmes*, 503 U.S. at 288. In creating RICO, Congress abandoned two earlier efforts to create anti-crime legislation, in part because the "standing" and causation requirements under existing antitrust laws were unsuitable for achieving the Congressional goal of combating criminal activity. The movement to enact RICO began with the report of a Presidential Commission examining the growing infiltration of legitimate business by organized crime. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME (1967). In response, the Senate originally proposed amendments to the Sherman Act in S. 2048, 90th Cong., 1st Sess. (1967). The Senate thereafter proposed an independent statute, S. 2049, 90th Cong., 1st Sess.

(1967). Disagreement arose over whether the desired legislation should be a part of antitrust law, or should be contained in a separate statute. One proposal consisted of amending the antitrust laws, and the other of creating a free-standing statute. The ABA Antitrust Section was asked for its opinion on the proposed laws, and they responded by urging that the proposed anti-crime legislation be separate from the antitrust laws. Their report stated in part:

> Moreover, the use of the antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons who might seek treble damage recovery. Such a private litigant would have to contend with a body of precedent-appropriate in a purely antitrust context-setting strict requirements on questions such as "standing to sue" and "proximate cause."

Report No. 12 of the Antitrust Section of the American Bar Association, *printed in* 115 Cong. Rec. 6994-95 (March 20, 1969). Courts have differed on the extent to which antitrust causation rules carry over into RICO. *See* Smith & Reed, *supra* note 312, at 6-63, 64. Gregory P. Joseph, Civil RICO: A Definitive Guide 41 (2d ed., 2000). However, despite uncertainty on the applicability of particular antitrust causation rules, a recent commentator has summarized the issue, "Nonetheless, consistent with the abundant legislative history supporting a liberal interpretation of RICO's remedial scope, a fair inference can be made that Congress intended a liberal interpretation of standing to sue under Section 1964." Smith & Reed, *supra* note 312, at 6-64.

The U.S. Supreme Court has frequently been guided by case law dealing with federal securities law violations, particularly Section 10b-5 of the Clayton Act, after which RICO's civil remedies were patterned. Cases dealing with causation under 10b-5 provide initial guidance on the relevance of subjective factors on the part of plaintiffs, such as reliance by plaintiffs on representations made by defendants in securities fraud cases. The judicial treatment of fraud issues under the mail and wire fraud provisions of Title 18 are also instructive, since these are listed predicate act statutes under RICO Section 1961(1)(B).

A recently published commentary provides a useful survey of 10b-5 and mail and wire fraud cases in the class action context, and merits quotation at length:

> A frequently asserted obstacle to class certification, especially in securities fraud actions, is the requirement for individual reliance on alleged fraudulent conduct. Reliance is a required element for common law fraud and for some types of securities fraud claims. Where a fraud has allegedly been perpetrated through oral representations, courts have held the individual differences outnumbered similarities. *By contrast, courts have been more inclined to treat reliance issues as common to a class where the alleged misconduct involved a fixed set of written materials or a standardized sales pitch.* Whether viewed as a commonality issue or a predominance issue, courts have fashioned a presumption of reliance in securities cases when the similarity of representation is sufficient to establish a fraud on the securities market in general. The presumption, known generally as the "fraud on the market theory," was upheld by the Supreme Court in *Basic Incorporated v. Levinson* as a permissible basis on which to obtain certification of a Rule 10b-5 securities fraud class action. Specifically, the Supreme Court affirmed the use, in class certification

The Supreme Court has consequently rejected a variety of standing limitations on RICO claims, such as the "competitive injury" requirement associated with antitrust laws.[328] In *Holmes v. S.I.P.C.*,[329] the Court held that proximate rather than "but for" causation applies under RICO, stating, "Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is adminis-

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> determinations for alleged Rule 10b-5 securities fraud violations, of a rebuttable presumption the allegedly defrauded investors relied on the integrity of the open securities marketplace in purchasing their stock . . . .
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> Under Levinson, therefore, *a securities fraud class may be certified as a class action without any direct showing by the plaintiff that the individual class members directly relied on the alleged misrepresentations of the defendants* . . . .
>
> . . . .
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> While the fraud on the market theory does not eliminate reliance as an element of a securities claim, it does diminish the evidentiary burden on plaintiff to prove reliance in a class action setting. The fraud on the market theory may, in turn, be applied to civil RICO class action certification rulings for RICO actions predicated on securities fraud violations. Outside the securities field, however, a substantial number of RICO claims are based on alleged mail and wire fraud violations. In criminal mail fraud prosecutions, courts have almost uniformly held that the government need not prove that the alleged victim of a scheme to defraud actually relied on the defendant's misrepresentations.

SMITH & REED, *supra* note 312, at 6-136) (emphasis added).

The variable burden of showing causation in fraud actions sanctioned by the Supreme Court in class action suits involving standardized or uniform representations by defendants is instructive, since such violations require proof of a plaintiff's subjective condition, whereas most gambling violations do not. This should make class certification for gambling violations involving standardized representations (such as video poker) easier than certification for travel cases.

[328] Sedima v. S.P.R.L., 473 U.S. 479, 496-97 (1985). The Fourth Circuit has also rejected restrictive standing or causation limits in actions under RICO Section 1962(a). Section 1962(a) prohibits using or investing racketeering proceeds to acquire, establish or control an interstate enterprise. In *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 836-40 (4th Cir. 1990), the court held that a plaintiff's damages to business or property may be caused by the predicate acts of racketeering themselves, and need not be caused by the investment.

[329] 503 U.S. 258 (1992).

tratively possible and convenient.'"[330]

The Court in *Holmes* specified three considerations applicable to the proximate cause determination. These include (1) factual causation,[331] (2) the problem of complicated rules of apportionment of damages among plaintiffs "removed at different levels of injury from the violative acts,"[332] and (3) the consideration that any differential rule of damage apportionment "is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs more remotely injured."[333] In the normal gambling case, a gambling operator has made available to the public some kind of standardized opportunity to gamble, such as with a video machine available to all comers. Thus factor number one discussed in *Holmes*, factual causation, is not a barrier to recovery, since normally all losses will have resulted from the use of standardized machines accompanied by the offer of winnings prohibited by state law. That is, whatever losses a plaintiff may have suffered normally come through the use of an illegally operated machine. Additionally, most state proscriptions of private lotteries or gambling are in the form of absolute rules or restrictions, and are unlike fraud claims, which require a showing of plaintiff's subjective condition (such as "reliance"). In the South Carolina example discussed above, state law has declared that a video machine operator shall not operate machines subject to an offer defined by the law as excessive. Thus, it would be no defense to a state prosecution that any individual players using unlawfully operated machines was not subjectively induced. It would be no defense to prosecution that any individual player was illiterate or mentally impaired, and could not understand the offer.

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[330] *Holmes*, 503 U.S. at 267-68.

[331] *Id.* at 268 ("Accordingly, among the many shapes the concept took at common law . . . was a demand for some direct relation between the injury asserted and the injurious conduct alleged."). The Court in *Holmes* also remarked that "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Id.*

[332] *Id.*

[333] *Id.* at 269-70. The Court held that these considerations apply to actions under Section 1964(c) of RICO. The Court in *Holmes* dealt with the right of the Securities Investor Protection Corporation to sue as subrogated plaintiff for losses sustained by investors using securities firms that manipulated the market for certain securities. *Id.* at 261. The Court held that such subrogated recovery was proper only as to those investors that bought the manipulated securities, as opposed to losses sustained by investors purchasing non-manipulated securities from the same firm. *Id.* at 270-74. The Court held that the injuries of the latter class of purchasers was too remote to satisfy the proximate cause requirements of RICO Section 1964(c). *Id.* The Court stated, "Allowing suits by those injured only indirectly would open the door to massive and complex damages litigation, which would not only burden the courts, but also undermine the effectiveness of treble damage suits." *Holmes*, 503 U.S. at 274 (internal quotations and citations omitted).

Consideration number two set forth in *Holmes*, *supra*, the problem of complicated rules of apportionment of damages among plaintiffs "removed at different levels of injury from the violative acts," normally should be no barrier to civil RICO recovery in gambling cases, since normally all participating gamblers experience the same type of injury from the violative acts. With video gambling cases, all plaintiffs are usually identically situated in that they claim only losses occasioned by the use of the machines operated in a manner violative of state law.

The Supreme Court has been clear that, since RICO violations are defined by statute, it is the RICO statute that should inform proximate cause or standing decisions. In *Sedima, S.P.R.L. v. Imrex Co.*, the Court stated:

> Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of Section 1962, nor is mere commission of the predicate offenses. In addition, the plaintiff only has standing if, and can recover only to the extent that, he has been injured in his business or property *by the conduct constituting the violation* . . . . Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm cause by the predicate acts sufficiently related to constitute a pattern, for *the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.* Those acts are, when committed in the circumstances delineated in Section 1962(c), "an activity which RICO was designed to deter." *Any recoverable damages occur-*

> *ring by reason of a violation of Section 1962(c) will flow from the commission of the predicate acts.*[334]

In *Blue Cross & Blue Shield v. Philip Morris*,[335] applying the test set forth in *Holmes*, the district court permitted recovery by a nationwide provider of medical services for economic losses occasioned in the provision of medical treatment of tobacco-related diseases.[336] The court commented on the proximate cause requirements of RICO citing *Holmes v. S.I.P.C.*, *supra.*[337] The court in *Blue Cross* stated:

> The Supreme Court . . . was careful to point out that the

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[334] 473 U.S. 479, 496-497 (1985) (emphasis added and internal citations omitted). This is the universally-employed method of evaluating causation in situations where the duty and breach are defined by a statute, as opposed to some non-statutory common law standard. PROSSER, *supra* note 325, at 225 ("The purpose of legislation is of course a matter of interpretation of its terms, the light of the evil to be remedied."). In *Abrahams v. Young & Rubicam, Inc.*, 79 F.3d 234, 237 (2d. Cir. 1996), Judge Winter expressly recognized this principle as black-letter RICO law. Applying the *Holmes* test, the court remarked:

> But liability [under RICO], although discussed under the rubric of causation, does not turn on the existence of factual, but-for causation. Nor does it depend on whether there is proximate causation as that term is used at common law. At common law, so long as the plaintiff category is foreseeable, there is no requirement that the risk of injury to the plaintiff, and the risk of the harm that actually occurred, were what made the defendant's actions wrongful in the first place. With statutory claims, the issue is, instead, one of statutory intent: was the plaintiff (even though foreseeably injured) in the category the statute meant to protect and was the harm that occurred (again, even if foreseeable), the "mischief" the statute sought to avoid.

Abrahams, 79 F.3d at 237.

[335] 36 F. Supp. 2d 560 (E.D. N.Y. 1999)

[336] *Blue Cross*, 36 F. Supp. 2d. at 573-75.

[337] *Id.* at 574. The court in *Blue Cross* stated:

> Proximate cause, the Supreme Court suggested, is one of those "judicial tools" that courts employ to limit a party's responsibility for the consequences of its acts. "At bottom," the Court continued, "the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'"

Id. (citations omitted). This is a traditional hornbook formulation of proximate cause principles. As stated in *State of Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956, 957 (E.D. Tex. 1997), "Generally speaking, proximate cause embodies 'ideas of what justice demands, or of what is administratively possible and convenient.'" (citing KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 41 at 264 (5th ed. 1984)).

> issue of proximate cause is not conducive to black letter rules . . . "[T]he infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." . . . Ultimately the concept of proximate cause requires the courts to distinguish between the conduct our society wishes to punish and deter from that which it is prepared to encourage or tolerate. This determination is primarily one of policy, requiring a highly flexible and case specific approach.[338]

Reliance or any other subjective factor concerning the plaintiff should not be an element in the definition of RICO wrongdoing, *unless the particular predicate act used as an underlying offense so requires.* Only then can such subjective factors enter into the proximate cause determination. Few of the underlying predicate act offenses incorporated into RICO require reliance as an element of the offense, or involve considerations relating to the plaintiff's state of mind.[339] Fraud claims frequently raise considerations of reliance. Classic fraud consists of false or misleading representations by a defendant which deceive a plaintiff, or cause him to rely on the representation to his detriment. Only if he subjectively relies on defendant's representation—a subjective question—is he caused harm in a legal sense. Gambling laws that forbid and make "chargeable" certain conduct do not normally contain such a reliance requirement. Under certain predicate act statutes contained in RICO, such as 18 U.S.C. Sections 1952 and 1955, *there is no reliance requirement.*

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[338] *Blue Cross*, 36 F. Supp.2d at 579 (alteration in original) (citations omitted). The court in *Blue Cross* applied the three separate considerations applicable to the RICO proximate cause analysis, and emphasized the statutory purpose of RICO in applying the second and third policy considerations announced in *Holmes*. *Id.* at 574. The court in *Blue Cross* stated:

> The Court in *Holmes* identified three principal policy considerations underlying the proximate cause analysis. As already noted. . . the instant suit is compatible with these policy considerations. No troubling issues of apportionment or multiple causation are now presented. The plaintiffs are fully capable of litigating their claim for RICO injuries and vindicating public policy. *Society's general interest in RICO's enforcement, which depends upon the plaintiffs' standing, is an important policy consideration which weighs heavily in favor of finding proximate cause.*

Id. at 580 (emphasis added).

[339] Even in cases dealing with mail and wire fraud as RICO predicate acts, where some misrepresentation or omission is allegedly the proximate cause of harm, courts have split on whether or not reliance by the plaintiff is a necessary element in a RICO claim. *Compare* Pelletier v. Zweifel, 921 F.2d 1465, 1499-1500 (11th Cir. 1991) (reflecting the majority position that reliance is required), *with* Sebago, Inc. v. Beazer East, Inc., 18 F. Supp. 2d 70, 81-83 (D. Mass. 1998) (following the minority declining to impose a reliance requirement as a part of proximate cause). The Fourth Circuit follows the majority rule. *See* Chisolm v.

This means that, where a defendant's breach of duty is defined by the violation of a statute, the determination of proximate cause is guided by the purposes of the statute.[340] Unless the state law used to form the basis of a civil RICO suit *itself* requires a showing of something beyond the *Holmes* requirements (such as the plaintiff's "reliance" or state of mind, as in a fraud case), there should be no such requirement as a part of a showing of proximate cause under RICO.[341] Nor

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TranSouth Fin. Corp., 95 F.3d 331 (4th Cir. 1996); Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir. 1988). *Chisolm* discussed proximate cause under RICO only in connection with mail fraud as a predicate act. *Chilsolm,* 95 F.3d at 337. The court in *Chisolm* stated, "The only caveat is that, *where fraud is alleged as a proximate cause of the injury,* then the fraud must be a 'classic' one. In other words, the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation." *Id.* (emphasis added). *Chisolm* announced no general requirement for cases where the predicate acts are other than fraud. *Id.*

[340] In a RICO case, this means the purposes of RICO. As the court in *Blue Cross* stated, "*Society's general interest in RICO's enforcement, which depends upon the plaintiffs' standing, is an important policy consideration which weighs heavily in favor of finding proximate cause.*" *Blue Cross*, 26 F. Supp. 2d at 580 (emphasis added).

[341] As the United States Supreme Court held in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985):

> [A] Plaintiff only has standing if, and can recover only to the extent that, he has been injured in his business or property *by the conduct constituting the violation . . . But the statute requires no more than this.* Where the Plaintiff alleges each element of the violation, *the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern*, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.

Sedima, 473 U.S. at 496-97 (emphasis added).

Where the underlying state law requires proof of some subjective factor (such

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as reliance by plaintiff as a false or misleading statement, or intent or knowledge of defendant), this must be proven to sustain a RICO claim, but *not otherwise*. Likewise, where the RICO predicate acts employed by a plaintiff are mail or wire fraud, reliance on the allegedly fraudulent representations is necessary. For other predicate acts (i.e., those under 18 U.S.C. §§ 1952, 1955, 1956 or 1957), no allegation or proof of any subjective response by plaintiff is required. In such cases, plaintiff must only show proximate cause of the type analyzed in *Holmes v. S.I.P.C.*, 503 U.S. 258 (1992) (*see supra* notes 329-33 and accompanying text). Miller v. Affiliated Fin. Corp., 600 F. Supp. 987, 993-94 (N.D. Ill. 1984).

See also Am. Nat'l. Bank & Trust Co. v. Haroco, Inc., 473 U.S. 606, 609 (1985); Khurma v. Innovative Health Care Sys., Inc., 130 F.3d 143, 147-49 (5th Cir. 1997); Marshall S. Isley Trust Co. v. Pate, 819 F.2d 806, 809 (7th Cir. 1987). In *Haroco*, the Supreme Court rejected defendant's argument that the "by reason of" language in RICO § 1964(c) required that plaintiff's harm be caused not by the predicate acts themselves, but by the fact "that they were performed as part of the conduct of the enterprise." *Haroco*, 473 U.S. at 609. The Supreme Court characterized the addition of any requirement other than traditional proximate cause from the predicate acts themselves as "amorphous and unfounded restrictions on the RICO private action." *Id.* While some courts, including the Fourth Circuit, hold that a RICO claim based on the Mail and Wire Fraud Statutes requires a showing of reliance by the plaintiff on the representation of a defendant, the state laws on gambling do not normally entail any subjective factors pertinent to plaintiffs.

The Supreme Court has expressly rejected characterizations outside the plain language of RICO itself as conditioning liability. *See Sedima, S.P.R.L.*, 473 U.S. at 479 (rejecting the "racketeering injury" requirement some lower courts found implied by RICO). Introducing into a RICO claim any extraordinary requirements derived from the underlying purposes behind the state law beyond proximate physical cause would be contrary to the precedent. A primary virtue of the substantive elements of RICO is that they are uncluttered by state labels or procedures. The separate nature of RICO and underlying state law is evident throughout RICO jurisprudence and that of the predicate act statutes incorporated into RICO. For example, under the Travel Act, 18 U.S.C. § 1952, it is not necessary to prove the commission of facts that satisfy the elements of an underlying state crime. It is only necessary to show interstate travel with the *intent* to promote such acts. United States v. Davis, 965 F.2d 804 (10th Cir. 1992); United States v. Jenkins, 943 F.2d 167 (2d Cir. 1991). The required "intent" is that of the perpetrator, not the party damaged by the perpetrator's acts.

Cases following *Holmes* leave no doubt that the traditional common law concepts of proximate cause are applicable to RICO. In *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 172 F.3d 223 (2d Cir. 1999), the Second Circuit found that the money paid by the plaintiffs (employee health and welfare trust funds) for tobacco-related illnesses of covered members was not sufficiently direct to satisfy RICO proximate cause requirements. In *Laborers Local 17*, the defendants directly injured a group of third parties, resulting in loss to the plaintiff funds. The basis for the court's holding was that the claims of the funds were derivative, i.e., were derived from the losses of others, and did not result directly from acts of the tobacco company defendant committed against the funds themselves. See *Laborers Local 17*, 172 F.3d at 230-35 for a full discussion of proximate cause under should reliance or state of mind normally be a consideration for class certification in gambling cases. It is certainly true that there are dissimilarities in the motivation of each individual player using a standardized form of gambling. Some are more prone than others to follow a path to genuine addiction, so that their play is no longer volitional in the true sense. In the South Carolina example, all players may not be playing exclusively to win an illegally offered payout. But this does not change the fact that the offered payout is equally illegal in all cases, and it does not take too much imagination to see why forays into the subjective condition of each plaintiff provide an attractive defense strategy on both the merits and on class certification issues. It is tempting for gambling operators sued under RICO to argue that dissimilarities in the motivation of each player using the defendant's gambling machines must be resolved on a case-by-case basis to establish liability, and that any such dissimilarities cause individual issues to predominate over common issues of fact and law, thus preventing certification of a plaintiff class.

In the ongoing federal litigation in *Johnson,* the South Carolina RICO gambling case, the plaintiff employed, among other state laws, S.C. CODE ANN. §§ 2804(B), (F) (2002), which made it unlawful to offer any "special inducement," which the South Carolina Supreme Court has held to include offering more than the daily winnings cap contained in the state law.[342] Though the underlying psychological dynamic that the legislation assumed would cause the "inducement" or attraction was unlimited winnings, the legislature chose to control this mischief with an outright ban on all offers of winnings over $125. Defendants have repeatedly asserted that a plaintiff's reliance on the illegal inducements prohibited by state law are relevant to the issue of standing or causation, and that losses directly incurred through participation in unlawfully-conducted gambling should be excluded if they are not *purely* the result of attempts to win an illegal payout. Defendants contend that the

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RICO. Compare this with the *Blue Cross* case, *see supra* notes 335-38 and accompanying text.

[342] Johnson v. Collins Entm't Co., 564 S.E. 2d 653, 658 (S.C. 2002).

individual state of mind of each plaintiff is relevant to both the plaintiffs' claims on the merits and certification of a plaintiff class. They argue that dissimilarities in the motivation of each player using a defendant's gambling machines must be resolved on a case-by-case basis to establish liability, and that any such dissimilarities cause individual issues to predominate over issues of fact and law. The "mischief" RICO seeks to avoid is using interstate means to carry on activity that is potentially chargeable under state law. Additionally, the "mischief" that the law seeks to avoid in the instant case is the *offering* of excessive winnings. All technical elements of state law, such as prosecutorial discretion, the preconditions to prosecution, statutes of limitation and the like are all irrelevant to RICO. Plaintiffs in *Johnson* argued that it would be improper to graft onto RICO any subjective element, such as plaintiffs' state of mind, based on the legislature's assumption that the offer of excessive winnings would likely provide the attraction for excessive gambling.

Such defensive strategies, if successful, would effectively eliminate civil RICO as a tool to combat gambling (and presumably other areas included in RICO, such as narcotics laws). However, it must be stressed that *only those state statutes dealing with gambling are relevant to such causation arguments*, whether directly incorporated into RICO by § 1961(1)(A) or indirectly incorporated through federal statutes listed in § 1961(1)(B).

These incorporated state laws define the substantive offenses upon which a RICO violation is based. It is these substantive state laws that establish *what* must cause harm to a plaintiff in a civil action under RICO. Some of the substantive laws incorporated into RICO require a showing of a subjective element by a victim, and some do not. Whether such a subjective element is required (for example "reliance" in a fraud case using the Mail Fraud Statute to establish the substantive offense/predicate acts) sometimes depends upon whether RICO is prosecuted criminally as opposed to civilly. In a criminal prosecution for violation of the Mail Fraud Statute, no such reliance need be shown, since the Mail Fraud Statute punishes the use of the mails for the purpose of executing a scheme or artifice to defraud. The criminal offense does not require that the fraud be successful or be completed. A civil action under the same statute *would* require reliance, however, *because the legal definition of fraud in a civil case requires reliance.* In a civil fraud case, common law rules defining the substantive offense are incorporated into the underlying federal law.[343] Thus, in a civil case, you cannot be held to have defrauded someone without showing reliance on the material misrepresentations which constitute the fraud. Subjective factors (such as the plaintiff's state of mind or reliance) are deemed relevant under RICO only where *the particular law used by a plaintiff as a RICO predicate act includes plaintiff's state of mind as an element of the offense.* In a fraud case, *reliance is necessarily the way in which the fraudulent scheme causes the harm.* Requiring reliance is inherent in the definition of fraud in an individual case. *In a civil RICO case, the state law defining the underlying substantive offenses by definition also defines exactly what conduct must cause harm in a civil RICO case.* Unless the state statute itself or common law rules illuminating the meaning of the statutory language compel an inquiry into plaintiffs' state of mind, no such inquiry should be required. In the normal case, state gambling law offenses are complete without such a showing, and fraud-based subjective requirements such as reliance should not be grafted onto a non-fraud case. In other words, a civil RICO plaintiff's claims based on state gambling laws do not allege that the plaintiff was defrauded, but only that he or she was injured "by reason of" the conduct constituting the violation.

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[343] In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that "materiality" was incorporated as a requirement for a criminal prosecution for mail fraud, since the common law elements of fraud were presumably relied on by Congress in enacting the statute. The Court stated:

> "[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense." . . . The Government does not dispute that both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud and bank fraud statutes, actionable "fraud" had a well-settled meaning at common law. Nor does it dispute that the well-settled meaning of "fraud" required a misrepresentation or concealment of *material* fact. Indeed, as the sources we are aware of demonstrate, the common law could not have conceived of "fraud" without proof of materiality . . . . In one sense, the Government is correct that the fraud statutes did not incorporate *all* the elements of common-law fraud. The common law requirements of "justifiable reliance" and "damages," for example, plainly have no place in the federal fraud statutes . . . "[Under the mail fraud statute,] the government does not have to prove actual reliance upon the defendant's misrepresentations." . . . "Civilly of course the [mail fraud statute] would fail without proof of damage, but that has no application to criminal liability."

Neder, 527 U.S. at 22, 24-25 (1999) (alterations in original) (citations omitted).

A series of recent RICO gambling cases clearly demonstrates great inconsistency and confusion in applying the *Holmes* proximate cause standards in a civil RICO gambling case. In a series of cases styled *Schwartz v. The Upper Deck Co.*, the United States District Court for the Southern District of California issued three separate opinions dealing with various state gambling laws used by plaintiffs therein to define RICO predicate acts.[344] Plaintiffs in *Schwartz* also sought a nationwide plaintiff class certification.[345] Plaintiffs based their RICO claim on violations of New York and New Jersey anti-lottery statutes.[346] Plaintiffs were purchasers of sports trading cards produced and sold by defendants who alleged that defendant's practice of randomly including rare collectable cards ("chase" cards depicting famous athletes) in packages sold constituted gambling chargeable under the laws of New York and New Jersey, where the cards were purchased.[347] The "chase" cards had current market value, while the "common" cards with which they were mixed had only a nominal value, but might in the future become valuable, depending on the fame and success of the subject depicted on the card.[348] Both the New York and New Jersey laws relied on by plaintiffs in *Schwartz* contained a traditional definition of an illegal lottery, requiring the participant to pay consideration for a chance for a prize.[349] The relevant New York and New Jersey statutes were identical, and defined an unlawful lottery as:

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[344] Schwartz v. The Upper Deck Co., 956 F. Supp. 1552 (S.D. Cal. 1997) (*Schwartz I*); Schwartz v. The Upper Deck Co., 967 F. Supp. 405 (S.D. Cal. 1997) (*Schwartz II*); Schwartz v. The Upper Deck Co., 183 F.R.D. 672 (S.D. Cal. 1999) (*Schwartz III*).

[345] *Schwartz I*, 956 F. Supp. at 1554.

[346] *Id.* at 1556.

[347] *Id.*

[348] *Id.* at 1557.

> [A]n unlawful gambling scheme in which (a) the players *pay or agree to pay something of value for chances*, represented and differentiated by numbers or by combinations of numbers or by some other media, one or more of which chances are to be designated the winning ones; and (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value.[350]

The state law relied on by plaintiffs as a RICO predicate act in *Schwartz* specifically required a determination of the purpose of each plaintiff's purchases, since the value paid had to be for the purpose of acquiring chances.[351] It was not illegal under either state's laws to sell sports trading cards. Money paid for some other purpose than procuring a chance for a prize would not violate this provision of state law.[352] A defendant could not be charged under state law without having engaged a participant in a scheme to pay money for the purpose specified by the statute.[353] The difficulty faced by the plaintiffs in *Schwartz* was the possibility that only part of what each plaintiff received was the chance of winning a valuable chase card. Another part was the receipt of nominally and potentially valuable common cards. In contrast, *each and every time* a defendant in a typical lottery case or a case dealing with prohibited gambling activity offers winnings prohibited by law, they violate the law.

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[349] *Id.* at 1557-58.

[350] N.Y. PENAL LAW § 225.00(10) (2000) (emphasis added); N.J. STAT. ANN. § 2C:37-1 (1995) (emphasis added). The court also noted that state law granted individual plaintiffs standing to recover gambling losses. New York law provided: "Any person who shall purchase any share, interest, ticket . . . or . . . any portion of any lottery, may sue for and recover double the sum of money, and double the value of goods or things in action, *which he may have paid or delivered in consideration of such purchases*, with double the costs of suit." N.Y. GEN. OBLIG. LAW § 5-423 (2001) (emphasis added).

[351] *Schwartz I*, 956 F. Supp. at 1558-59.

[352] *Id.* at 1558.

[353] *Id.* at 1559.

In its first opinion, *Schwartz I*, the district court held that plaintiffs had not alleged that they purchased cards for the chance of obtaining a "chase" card.[354] Plaintiffs had insufficiently alleged that consideration was given for a chance for a prize.[355] The court dismissed the RICO claim for money spent on card purchases with leave to amend, stating that plaintiffs *could* sustain a RICO claim for the money spent on card purchases, so long as they amended their complaint to include the allegation that the purchases were for the purpose of obtaining "chase" cards.[356] Under the reasoning in the *Schwartz* cases, if plaintiffs had alleged and could prove that they received nothing but a chance for a "chase" card for their money, *all* such money would be recoverable. There is not the slightest hint in *Schwartz* that plaintiffs' recovery of money attributable to the gambling losses would be affected by their state of mind other than in reference to an element specifically required by state law, or by some subjective value they received by participating in unlawful gambling (the "entertainment" experience of a game of chance). The only question was what part of the money paid by plaintiffs invoked the state law lottery prohibition. The "mixed" nature of the transaction involved in *Schwartz* created the possibility that some plaintiffs were simply buying baseball trading cards.

The *Schwartz* plaintiffs thereafter amended their complaint to include the allegation that card purchases were made for the purpose of obtaining "chase" cards, and the defendants moved to dismiss the amended complaint. The court dealt with defendant's post-amendment motion to dismiss in *Schwartz v. The Upper Deck Co.* ("*Schwartz II*").[357] The court in *Schwartz*

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[354] *Id.* at 1560.

[355] *Id.*

[356] *Schwartz I*, 956 F. Supp. at 1560. The court also held that plaintiffs' allegations sufficiently alleged violations of New York and New Jersey anti-lottery statutes. *Id.* at 1557-59. This would support their RICO claims under properly-alleged facts. *Id.* at 1556-58.

[357] 967 F. Supp. 405 (S.D. Cal. 1997). Plaintiffs also filed four other class action suits against other manufacturers of trading cards, one of which resulted in the opinion in *Price v. Pinnacle Brands*, 138 F.3d 602 (5th Cir. 1998), relied on by the Defendant herein. Two of the plaintiffs in *Schwartz* were also plaintiffs in *Price*. *Price* held that the plaintiffs had failed to allege that they purchased cards

II held:

> The Court finds that plaintiffs have stated a cause of action under RICO because they allege that the prices of the chase cards on the secondary market have been manipulated to the point where they are disproportionately higher than the value of common cards. They are so valuable that people gamble by buying many packages of cards in the hopes of receiving a chase card which can then be exchanged for cash. The gravamen of plaintiff's complaint is not that people purchase the packages to obtain a card of their favorite player, but that they purchase the packages to obtain a small piece of cardboard which can be exchanged for cash. Whether the piece of cardboard contains lotto numbers, scratch-off boxes, or the face of Michael Jordan, it is still gambling . . . . Plaintiffs are not suing because they were disappointed over not getting a Ken Griffy, Jr. card, *but because they have suffered gambling losses*. They allege that a portion of the price paid for a package of Upper Deck cards is consideration for a chance to receive a chase card. They do not care whose face is on the card; they only care about its value in the secondary market. According to plaintiffs' allegations, this is no different than dropping a quarter in the slot machine. Plaintiffs have suffered a tangible loss *in that they have spent a fixed amount on chances to receive chase cards.*[358]

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for the chance of winning a "chase" card. The court in *Schwartz II* noted that this "same deficiency" had been present in *Schwartz I*, but that plaintiffs had cured this deficiency by amendment. *Schwartz II*, 967 F. Supp. at 409 n.4.

In *Schwartz II*, the court noted that several plaintiffs and defendants involved in *Schwartz* were not present in *Price*. *Id.* at 409. Therefore, the court declined to follow the ruling in *Price*, and affirmed that defendant's conduct violated New York and New Jersey anti-lottery laws. *Id.* at 409-10.

[358] *Id.* at 413-14 (emphasis added). As the court stated in *Schwartz I*, "The purpose of RICO is not to harm or reward the gamblers, but to shut-down the people or companies running illegal gambling operations." *Schwartz I,* 956 F. Supp. at 1557.

The purpose behind RICO's civil action provision in the area of illegal gambling is pertinent to the proximate cause analysis under *Holmes*. *See* Holmes v. S.I.P.C., 503 U.S. 258, 268 (1992) (*see supra* notes 326-33 and accompanying text). In *Schwartz I,* the court stated:

> Defendant misconstrues the purpose behind allowing recovery of gambling losses. *The purpose of RICO is not to harm or reward the gamblers, but to shut-down the people or companies running illegal gambling operations.* If recovery of gambling losses were barred, then illegal gambling opera-

The plaintiffs' problem in *Schwartz I* was that the facts they adduced did not necessarily show a violation of State law in every individual case. Because the transaction in *Schwartz* was not a "pure" lottery (part of the consideration paid by each plaintiff was by definition for personal property of indefinite value), the court in *Schwartz II* held that plaintiffs' claim for money paid for card purchases required plaintiffs "to establish what portion of the purchase price of packages of Upper Deck cards is consideration for the common cards received and what portion is consideration for the chance of receiving a chase card."[359] This was necessary because plaintiffs unquestionably received tangible property, the "common" cards, that may have some value, though the value would necessarily depend on speculative future events (whether the player depicted became successful and famous, driving up the card price on the secondary market).[360] The problem facing plaintiffs in *Schwartz* arose from the fact that state law required a showing of wrongdoing, not from any general legal rule requiring investigation of their state of mind. If defendants in *Schwartz I* had been selling lottery tickets against a future drawing for a prize, there is no doubt that the sale of each ticket would have violated the law. The factual problem in *Schwartz I* was that something

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> tions would be immune from civil liability. The only people directly injured by a bookmaking scheme are the people who lose money gambling with the bookie. If they are barred from recovering from the bookie, he is in effect civilly immune. The whole point of Civil RICO is to provide a civil means of attacking racketeering activity. Civil RICO is intended to have the exact effect that defendant complains of. People who gamble and lose will seek to recover three times their losses from the organization running the illegal gambling scheme. This will ensure that the gambling operation's future is short-lived.

Id. (emphasis added).

[359] *Schwartz II*, 967 F. Supp. at 414 n.8.

[360] *Id.* at 414. In contrast, Plaintiffs in *Johnson* spent a fixed amount on nothing but chance. Even under the holding in *Schwartz II*, each individual plaintiff would have the opportunity to introduce evidence that he was motivated solely by the chance to receive a valuable "chase" card and, if this evidence prevailed, would be able to recover all money spent on cards. The issue of motive was relevant because the state law defined the violation in terms of the motive behind the purchase.

other than a lottery may have transpired in any individual case, since some purchasers could have been simply buying sports trading cards.

Having found that plaintiffs' complaint was not deficient, the court in *Schwartz II* held that the value of "chase" cards was "readily ascertainable in published price guides."[361] The court concluded, "Plaintiffs have lost property, their money, and can recover that lost property under RICO."[362]

Later, the court denied plaintiffs' motion for a nationwide class certification in *Schwartz v. The Upper Deck Co.* (*Schwartz III*).[363] Significantly, the court in *Schwartz III* noted the impact of major differences in the gambling laws of all fifty states on the RICO requirement that the predicate offense be punishable criminally by imprisonment for more than one year.[364] The court noted that plaintiffs had not successfully developed a RICO cause of action using 18 U.S.C. § 1955 as a predicate act, since this RICO predicate act statute requires that defendant conduct be classified as "an 'illegal gambling business,'" which requires "a violation of the law of the state or political subdivision in which it is conducted," and that there was "a substantial question of fact and law whether Upper Deck is such a business under the law of any State."[365] Plaintiffs in *Schwartz III* did not invoke as a RICO predicate act any state law which was *per se* chargeable, but rather relied on the lottery provisions of New York and New Jersey under facts *that made the purpose of each plaintiff's purchase an element of the under-*

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[361] *Id.* at 413.

[362] *Id.* at 415.

[363] 183 F.R.D. 672 (S.D. Cal. 1999).

[364] *Schwartz III*, 183 F.R.D. at 677-78. In *Schwartz I*, plaintiffs relied on laws of states other than the forum state under RICO § 1961(1)(A), which contains a term-of-imprisonment requirement not found in RICO § 1961(1)(B). For purposes of class certification, whether or not RICO is violated *everywhere* that a multistate enterprise conducts business just because its activities violate the laws of *one* state was at issue in *Schwartz III*, but it is not an issue in the instant case. *See also* Sikes v. American Tel. & Tel. Co., 179 F.R.D. 342 (S.D. Ga. 1998). The court in *Schwartz III* noted the "need to examine the laws of a plethora of states," since plaintiff class certification was sought on a nation-wide basis. *Schwartz III*, 183 F.R.D. at 678.

[365] *Schwartz III* 183 F.R.D. at 678 (citations omitted).

lying state offense.[366] The court in *Schwartz* emphasized the importance of the distinction between a *per se* violation, as opposed to one containing some subjective factor in the definition of the violation itself.[367] The court thus stressed the fact that "the Defendants' conduct is not per se illegal."[368] The court stated, "The Defendant's conduct in the abstract is not problematic."[369] In *Schwartz III*, the court further remarked, "At oral argument, Plaintiffs hinted that Defendant's conduct is perhaps per se illegal. Not so."[370] The court responded, "Defendant does not violate California law by making its product."[371]

Schwartz III was a product of its particular facts, and was not a result of some general practice of interjecting "state of mind" or some other subjective factor into all RICO claims under the guise of proximate cause. Solely because it involved a "mixed" lottery as a matter of fact, the defendant's conduct in *Schwartz* did not necessarily violate state law in each and every sale to the plaintiffs. In contrast, most state gambling laws involve some prohibition on a defined activity that amounts to a violation in each and every instance (such as the offering of statutorily prohibited winnings or offering a lottery) and is usually chargeable under state law without making reference to the Plaintiffs' state of mind as a necessary element of the state law offense.[372]

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[366] *Id.* at 677-78.

[367] *Id.*

[368] *Id.* at 676 n.1.

[369] *Id.* at 677.

[370] *Schwartz* III, 183 F.R.D. at 683.

[371] *Id.* at 678.

[372] *See* United States v. Jones, 909 F.2d 533 (D.C. Cir. 1990) (discussing the relevance of state law under the Travel Act, 18 U.S.C. § 1952). Unlike § 1955, the Travel Act requires "specific intent." 18 U.S.C. § 1952 (2000). The Travel Act requires that defendant's intent must be to further offenses against a specific state law *in terms of that state law offense. Jones,* 909 F.2d at 539. The intent that is required by the Travel Act is *the defendant's intent* in terms of the elements of the state law violation. *Id.* It is not necessary that the State law offense ever be completed, but it is necessary that the intent relate to the elements for the offense as they are set forth in state law. *Id.* Nothing more is required under the Travel Act. *Id.* There is no implied requirement of proving any subjective condition on the part of a victim or party other than the defendant, and such

Another subsequent trading card case before the same court that decided *Schwartz* illustrates the impact of the internal requirements in the state law used as a RICO predicate act on the one hand and proximate cause on the other. In *Dumas v. Major League Baseball Properties, Inc.*,[373] involving facts similar to those in *Schwartz*, other plaintiffs asserted § 1955 violations as RICO predicate acts, basing their claims on violations of local state law, rather than the law of another jurisdiction.[374] In *Dumas*, the same district judge who decided *Schwartz I, II* and *III* held that, even if the court had been incorrect about the reading of New York and New Jersey law in the *Schwartz* cases, the *Dumas* plaintiffs had alleged violations of § 1955, predicated on a violation of California law.[375] The court sustained this claim.[376] The court in *Dumas* clearly recognized that considerations relevant to plaintiffs' state of mind were necessary in *Schwartz* because of the unusual facts that made this issue essential to the cause of action itself. Defendants in *Dumas* had argued that plaintiffs did not have standing because they were not "direct purchasers" from defendants, who had produced and sold the cards to distributors for later retail sale.[377] The court distinguished between matters going to the definition of the wrongdoing on one hand, and the issue of standing or causation on the other, stating:

> More important, as alleged, this case is not about removed, indirectly injured plaintiffs. The alleged class is directly in-

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would only be relevant *if state law so required. The defendants' intent* to accomplish or promote acts as defined by the elements contained in the underlying State law is all that is required by the Travel Act. *Id.*

For purposes of a violation of § 1955, a specified RICO predicate act under RICO § 1961(1)(B), the State law violation need not be a felony, or be punishable by any particular length of imprisonment. *United States v. Polizzi*, 500 F.2d 856, 873 n.17 (9th Cir. 1974). A misdemeanor is sufficient. *Polizzi*, 500 F.2d at 873, n.17.

[373] 52 F. Supp. 2d 1170 (S.D. Cal. 1999).

[374] *Dumas*, 52 F. Supp. 2d at 1182.

[375] *Id.* (*citing* CAL. PENAL CODE § 319.3 (1999) and stating "Even if Defendants are correct that the court misinterpreted New York law . . . Plaintiffs have alleged a violation of California law, which, in turn, would form the basis of a violation of federal statute.").

[376] *Id.* at 1183.

[377] *Id.* at 1173.

> jured. The chase cards scheme is not targeted at intermediaries, but directly at consumers. These consumers are the first victims. It is consumers who immediately engage in the alleged lottery in their search for chase cards. Thus, concerns regarding indirect, remote plaintiffs are not at issue. In fact, as stated by the Court in . . . *Schwartz, there is no cause of action at all unless a consumer can demonstrate purchase of the cards because of the hope of obtaining a chase card.* Thus, intermediate parties such as retailers may have no cause of action. As only one level of purchasers is alleged to be injured, and, in fact, is injured, *the Court need not be concerned about "complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts."*[378]

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[378] *Id.* at 1174 (citations omitted) (emphasis added). In 1994, California had amended its definition of an illegal lottery to include the sale of "sports trading cards grab bags", or the sale of cards in which a valuable card might be contained in any individual group of cards. *See* CAL. BUS. & PROF. CODE § 17200 (1994).

"Section 1955 of Title 18 of the United States Code criminalizes illegal gambling operations of a certain size . . . . It does not prohibit gambling per se; rather, it punishes those who 'conduct . . . an illegal gambling *business*.'" United States v. Wall, 92 F.3d 1444, 1445, 1449 (6th Cir. 1996) (alteration in original) (citations omitted).

Further, one of the purposes of § 1955 is to prohibit the inducement to gamble generally, rather than to prohibit individualized inducement. In *United States v. Wall*, defendants argued that the operation of video machines was legal if conducted pursuant to a license, and therefore payouts for play on licensed machines could not support a § 1955 violation, even though the payouts themselves were prohibited by state law. *Wall,* 92 F.3d at 1453. In *Wall*, Tenn. Code Ann. § 39-17-503(a) served as the underlying state law gambling offense to support a § 1955 prosecution. This statute provided, "[A] person commits an offense who knowingly induces or aids another to engage in gambling, and . . . [i]ntends to derive or derives an economic benefit other than personal winnings from the gambling." *Id.* at 1452 n.19 (alteration in original) (citation omitted).

The court rejected defendant's arguments, stating:

> The defendants correctly note that the business of leasing video poker machines is a lawful, taxable privilege in Tennessee. By paying the proper tax, defendants were vested with the privilege of leasing the machines to location owners. Defendants contend that because their action—leasing the machines—was within the scope of the privilege for which they paid the tax, this activity was exempted from criminal prohibitions, even if the end-users employed the machines for gambling. This privilege, however, continues only so long as the privileged actor remains within the scope of his lawful licensed business. An actor who strays beyond the lawful privi-

In fact, courts have held that, even in civil RICO fraud cases where reliance is an underlying element of the cause of action, the RICO plaintiff in appropriate circumstances does not have the burden of proving it. In *Waters v. International Precious Metals Corp.*,[379] defendants operating a brokerage house allegedly solicited and stimulated excessive commodities trading to earn commissions.[380] Plaintiffs who had lost money on investments recommended by the defendants filed a class action, alleging that they never would have invested if they had known of the scheme.[381] Defendants moved to bar class-wide rulings on liability and damages, since the nature of the solicitation made by the defendants would vary from plaintiff to plaintiff.[382] The court ruled in favor of the plaintiffs on the certification of a plaintiff class.[383] The court employed a presumption of reliance, rather than allocating the burden of proof on this issue to each individual plaintiff.[384] The court's analysis deserves careful attention. The court stated:

> The Special Master held that the RICO claims can be determined on a class wide basis given Plaintiffs' theory of the case, that no Plaintiff would have invested but for the Alleged Scheme. Defendants argue that questions of reliance necessitate the need for individualized proof . . . . [T]his Court agrees with the Special Master that these claims may be determined on a class wide basis except that . . . with respect to the req-

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> lege is not protected and can be criminally charged. The privilege for leasing a coin-operated amusement device does not extend "to any device operated for the purpose of unlawful gambling." Defendants and the lessees of the machines anticipated that the machines would be used to gamble. By arranging to reimburse lessees for cash payouts to successful players, defendants stepped beyond the lawful privilege. *Defendants helped to induce gambling* and intended to derive an economic benefit from the gambling. . . . Consequently, they were properly charged under 18 U.S.C. § 1955.

Wall, 92 F.3d at 1453 (citations omitted) (emphasis added).

[379] 172 F.R.D. 479 (S.D. Fla. 1996).

[380] *Waters*, 172 F.R.D. at 483.

[381] *Id.* at 483.

[382] *Id.* at 484.

[383] *Id.* at 504.

[384] *Id.* at 484.

> uisite element of proximate cause, Defendants must be given the opportunity to rebut reliance by presenting proof that individual members of the Plaintiff class did not rely . . . . Courts which have addressed this issue in the context of class certification have found that common questions of law and fact clearly predominate over the reliance issue under these RICO claims, and individualized, fact based inquiries into the particular facts and circumstances surrounding each investment is unnecessary . . . . Therefore, this Court finds that the circumstances of this case present a situation . . . in which a presumption of reliance is appropriate. "Presumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult . . . . Furthermore, a reading of RICO to allow the presumption to satisfy the proximate cause requirement under these circumstances conforms with the policy that RICO should be broadly interpreted.[385]

It should be noted that the presumption of reliance should only be relevant where the cause of action involved (RICO mail and wire fraud) requires such a showing as an element of the cause of action.[386] For the type of RICO claims involved in *Johnson*, *supra*, and in typical gambling cases, the underlying causes of action do not contain a reliance requirement at all.[387]

Further, the court in *Waters* allowed as damages all "out of pocket capital invested by each individual plaintiff whom the

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[385] *Waters*, F.R.D. at 503-05 (citations omitted). *See also* Heastie v. Cmty. Bank, 125 F.R.D. 669 (N.D. Ill. 1989); McMahon Books, Inc. v. Willow Grove Assocs., 108 F.R.D. 32 (E.D. Pa. 1985).

[386] *Waters*, 172 F.R.D. at 504.

[387] A typical example is a civil RICO case based on a violation of state gambling laws punishable by more than one year of imprisonment, under RICO § 1961(1)(A) where the underlying state law contains a specific limitation or prohibition instead of a fraud-based rule. Another good example is a RICO action under § 1961(1)(B) based on one of the incorporated federal statutes therein, such as 18 U.S.C. § 1955. The latter statute makes it a federal crime to conduct a gambling business in violation of the laws of the state where it is conducted, if the particular statutory conditions of § 1955 are met. There is no element of reliance or fraud, so that the civil action using this statute to supply the RICO predicate acts would not entail any element of proof peculiar to fraud action, such as reliance.

Defendants are unable to prove did not rely."[388] This approach would be appropriate for the recovery of illegal gambling losses under civil RICO, and support class action treatment, since it is sometimes easier to calculate the total amount of illegally derived gambling revenues than to assess the losses of each individual plaintiff. Additionally, since illegal gambling operations such as those involving a prohibited private lottery or those using video machines are often presented to the broad general public in a standardized way, any showing of reliance by an injured plaintiff should be minimal, even in a fraud case. In *Falise v. American Tobacco Co.*,[389] the court distinguished between narrow, limited fraudulent schemes and broad-based ones, stating:

> Where the fraudulent scheme is limited in scope and specifically targeted at only one or a few individuals, organizations, or entities, the establishment of causation should require reliance on identifiable misrepresentations . . . . Where, however, the fraudulent scheme is targeted broadly at a large proportion of the American public the requisite showing of reliance is less demanding. Such sophisticated, broad-based fraudulent schemes by their very nature are likely to be designed to distort the entire body of public knowledge rather than to individually mislead millions of people. From the perspective of the fraudulent actors, clear efficiencies are gained by co-opting the media and other outlets of information as unwitting tools for the pervasive scheme.[390]

The district court in the *Schwartz* and *Dumas* cases decided to stay those actions pending the outcome of *Major League Baseball Properties v. Price*.[391] In *Price*, the defendant trading card manufacturers and licensors sought a declaratory judgment against card purchasers on the grounds that they lacked standing under RICO.[392] The *Schwartz*, *Dumas* and *Price* cases were all part of the plaintiff's effort to find a favorable forum for their RICO-based gambling claims against trading card manufacturers and licensors.[393]

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[388] *Waters*, 172 F.R.D. at 506.

[389] 94 F. Supp. 2d 316 (E.D.N.Y. 2000).

[390] *Falise*, 94 F. Supp. 2d at 335 (citations omitted).

[391] 105 F. Supp. 2d 46 (E.D.N.Y. 2000); *Dumas*, 52 F. Supp. 2d at 1195.

[392] *Price*, 105 F. Supp. 2d at 48 (E.D.N.Y. 2000).

The court in *Price* found that no criminal provision of New York law carrying a punishment of imprisonment for more than one year was applicable to the sale of trading cards, and there was, therefore, no act of racketeering involved.[394] The *Price* court held additionally that the plaintiffs had gotten what they had paid for.[395]

After the decision by the Southern District of New York in *Price*, the district court in the *Schwartz* and *Dumas* cases completely reversed itself, and dismissed the plaintiffs' RICO claims.[396] The district court judge, Hon. Rudi M. Brewster, decided that a civil RICO plaintiff would have to demonstrate injury from "a fraudulent gambling scheme," equating civil RICO gambling claims under RICO § 1961(1)(A) with RICO fraud claims, which are listed under RICO § 1961(1)(B).[397] Judge Brewster in *Dumas* stated of the plaintiffs: "They have failed to allege even a scintilla of fraudulent conduct by Defendants."[398]

In *Schwartz*, Judge Brewster added the alternative ground that, despite the illegality of the gambling activity under state law, "[p]laintiffs . . . received the benefit of their bargain . . . a pack of cards which included a *bona fide* 'chance to win.'"[399] Since the *Schwartz* and *Dumas* plaintiffs could not demonstrate common law fraud, and since they had actually received the thing they bargained for—participation in illegal gambling—their civil RICO claims were dismissed for lack of proximate cause.[400]

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[393] *Id.* at 48-49 (noting the history of these related lawsuits).

[394] *Id.* at 51.

[395] *Id.* at 53.

[396] Schwartz v. The Upper Deck Co., 104 F. Supp. 2d 1228 (S.D. Cal. 2000); Dumas v. Major League Baseball Props., Inc., 104 F. Supp. 2d 1220 (S.D. Cal. 2000).

[397] *Dumas*, 104 F. Supp. 2d at 1222-23.

[398] *Id.* at 1223. *Dumas* was based, in part, on 18 U.S.C. § 1955, which has nothing to do with fraud. Thus the *Dumas* court not only added a requirement not appropriate to the type of cause of action pursued, it also enforced stricter standards than would be required in a genuine fraud case, where a presumption of reliance is commonly applied to widespread standardized schemes.

[399] *Schwartz*, 104 F. Supp. 2d at 1230-31. The court further inquired: "Have Plaintiffs suffered an economic injury or loss, or have they in fact received the benefit of their bargain-the pack of cards and a chance to win?" *Id.* at 1230.

There is no obvious explanation for the two phases of *Schwartz* and *Dumas*, with their diametrically opposed and inconsistent holdings.[401] Perhaps Judge Brewster was confined to what was presented to him, and had no opportunity to broadly consider the general question of civil RICO in gambling cases. On the face of it, however, the "benefit of the bargain" theory seems no different from introducing an "*in pari delicto*" defense under the name of proximate cause, something RICO cases have rejected.[402] Also, one wonders why fraud is listed separately and in a separate section in RICO from cases dealing with gambling if in their application to civil RICO they are to be treated as identical. Additionally, doesn't one get the "benefit of the bargain" in the purchase of narcotics (listed as a RICO predicate act in RICO § 1961(1)(A))? It is hard to imagine an approach to proximate cause that would more effectively eliminate the usefulness of civil RICO in combating the activities Congress expressly listed in RICO than the one finally applied by Judge Brewster. Even though the civil RICO actions often associated with illegal gambling do not typically entail fraud, the final opinions in *Dumas* and *Schwartz* saddle the RICO illegal gambling case with greater burdens than a civil RICO securities fraud case, or a RICO mail and wire fraud case, where fraud and reliance must be established.

All that can be said of the final opinions in *Schwartz* and *Dumas* is that, like the Fourth Circuit's use of *Burford* abstention analysis discussed above, they amount to a very creative and eccentric jurisprudence that seems to thrive in the area of gambling, and that they are contrary to the reason and spirit of both the state and federal laws concerned. The public policy considerations connected with proximate cause announced by the Supreme Court in *Holmes*, discussed above, strongly support a finding of proximate cause in civil RICO gambling cases without requiring plaintiffs to prove any individualized "state of mind", or reintroducing an *in pari delicto* barrier to civil actions.[403] Certainly the third factor set forth by the Court in

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[400] *Dumas*, 104 F. Supp. 2d at 1223; *Schwartz*, 104 F. Supp. 2d at 1231.

[401] *Schwartz* was based in part on the violation of New York and New Jersey statutory lottery prohibitions, not mail or wire fraud, and *Dumas* was based in part on 18 U.S.C. § 1955, the Illegal Gambling Business Act, usable as a RICO predicate act under RICO § 1961(1)(B). There is no apparent reason to introduce legal rules pertaining to fraud cases into these claims.

[402] Bieter Co. v. Blomquist, 848 F. Supp. 1446 (D. Minn. 1994); *In re* Nat'l Mortgage Equity Sec. Litig., 636 F.Supp. 1138 (C.D. Cal. 1986).

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[403] One should remember that "in pari delicto" means "in *equal* fault." *See* BLACK'S LAW DICTIONARY 794 (7th ed. 1999) Additionally, issues of individualized reliance or inducement in civil RICO gambling cases should not necessarily prevent plaintiff class certification, since the defendants' conduct is normally standardized and uniform. This is especially true where only the laws of one jurisdiction are involved, and a nationwide class certification is not sought. In *Sikes v. Am. Tel. & Tel. Co.*, 179 F.R.D. 342, 346-48 (S.D. Ga. 1998), the court dealt with plaintiffs' attempt to certify a class based on allegations that defendant's "Lets Make A Deal" (LMAD) interactive telephone game offering cash prizes constituted illegal gambling. *Sikes*, 179 F.R.D. at 345-46. *Sikes* dealt with only one such program, and distinguished cases. relied on by defendant where numerous and different programs had been involved. *Id.* at 347-48. In denying defendant's motion to decertify a plaintiffs' class, the court stated:

> Thus, Defendant argues that in this case the Plaintiffs' mail and wire fraud claims cannot be maintained as a class action because of the presence of the individualized issues of reliance, injury, and damages. This argument, however, ignores the central difference between the *Andrews* and *Harper* cases and the present case: *Andrews* and *Harper* each involved numerous different 900-number programs, whereas this case involves only the LMAD game. The issues of individual reliance, injury, and damages did not, by themselves, preclude class certification in *Andrews* and *Harper*; rather, the manageability problems became insurmountable only when combined with other factors . . . . I previously concluded that the individual issues of reliance, injury, and damages do not preclude class certification in this case, and the panel majority's opinion in *Andrews* does not alter that conclusion . . . . Moreover, I concluded that reliance could virtually be presumed under the facts of this case, as any caller who played the game and who was charged more than he or she won in prizes was necessarily injured "by reason of" the game. Furthermore, I previously found that the game and its advertisements were fundamentally the same over the relevant time period. Thus the Plaintiffs have basically alleged that the Defendant in this case "committed the same unlawful acts in the same method against the entire class." . . . In sum, I find that the Plaintiffs' mail and wire fraud claims do not present the same manageability problems identified by the Eleventh Circuit in *Andrews* and *Harper*. This case, unlike both of those cases, does not involve "hundreds of widely differing 900-number programs," but rather involves only one game, the contours of which remained materially unchanged during the relevant time period. Thus, I am convinced that the issues of reliance, injury, and damages pertaining to the Plaintiffs' mail

Holmes–whether a finding of proximate cause would further the purposes of the law used as a RICO predicate act—supports this argument. The tortured twists and turns in cases like *Johnson*, *Schwartz* and *Dumas* are typical of RICO jurisprudence in the area of gambling law, perhaps in part because civil RICO cases to recover illegal gambling losses are rarer than other types of RICO cases.

IV. THE LOSERS

> *Do we not see how lightly people treat their fortunes, when under the influence of the passion of gaming?*
>
> Sir Edmund Burke[404]

The story of the winners in South Carolina's gambling experiment—the gambling operators and compliant politicians—is truly fascinating. Yet the story of the losers is even more so. South Carolina represents the perfect natural laboratory to study gambling behavior and to examine the question, "why do people gamble." Since 1868 the South Carolina Constitution had effectively forbidden legalized gambling, with the exception of charitable bingo created later, but during the 1990's the emergence and spread of video poker made it more convenient to gamble in the Palmetto state than anywhere else in the United States.[405] Video poker, often referred to as the "crack cocaine of gambling" due to its addictive powers, was available in South Carolina *only* through the venue of "convenience gambling," which is also thought to contribute to addiction.[406]

> and wire fraud claims are not an obstacle to class certification under Rule 23(b)(3).

Id. at 346-47 (citations omitted).

[404] EDMUND BURKE, *An Appeal From the New to the Old Whigs*, *in* 6 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE, 254 (C & J Livingston, 1825). Burke attributes the propensity to gamble to human nature itself. "Gaming is a principle inherent in human nature. It belongs to us all." *Id.* at 263.

[405] David Plotz, *supra* note 55, at 63, 64.

[406] Dr. Robert Hunter, a Las Vegas psychologist, is generally attributed with first referring to video poker as the "crack cocaine" of gambling. He also has referred to video poker as the "distilled essence of gambling."

Convenience gambling generally refers to gambling in a non-casino venue, When video poker became illegal in South Carolina July 1, 2000, after less than a decade of legitimacy, the machines were taking in over three billion dollars per year in a state whose yearly budget barely exceeded five billion dollars.[407] In less than a decade, gambling had gone from being almost non-existent to being the most dominant economic and political force in the state. Video poker made some people, such as Fred Collins, who reported profits of ninety million dollars in 1999, rich and powerful as it destroyed the lives of countless others, such as Joy Baker, who was left in her mother's car for nine hours on a hot summer afternoon and died from dehydration while her mother played video poker.[408] There is no question that from 1997 until 2000, thousands if not millions of South Carolinians, many for the first time in their lives, placed their lives and fortunes at risk by gambling. Perhaps a close examination of what happened in South Carolina can help answer the question "why do people gamble."

Michael Walker suggests in *The Psychology of Gambling* that we search for explanations of why people gamble from the perspective of either intra-personal processes or external processes, thus leading us to search for the genesis of gambling behavior in terms of sociology, psychology or economics.[409] Therefore, it is not uncommon to hear a common citizen describe his or her desire to gamble as "fun," or a recent visitor to Las Vegas describe his binge at the casinos as "entertainment," or a day trader describe his highly leveraged gamble on tech stocks as an "investment'" while social scientists use terms such as reinforcement schedules, utility and conditioning to

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such as a bar, gas station or convenience store. This venue is most often the site of stand-alone electronic gambling devices. *Convenience Gambling* is often very difficult to regulate. By increasing proximity/opportunity to gamble and relying mainly on *stand alone electronic gambling devices, convenience gambling* contributes to the development of pathological gambling.

[407] South Carolina Department of Revenue, Video Poker Quarterly Reports (2000) (unpublished report, on file with author).

[408] *The Victims of Video Poker,* THE STATE (Columbia, S.C.), July 26, 1999, at A8.

[409] MICHAEL B. WALKER, THE PSYCHOLOGY OF GAMBLING 96-97 (Michael Argyle ed., Pergamon Press 1992). For a further discussion of "why do people gamble," see THOMPSON, *supra* note 6, at 125-29.

describe gambling behavior. All of the reasons why a person might gamble can be classified for discussion into four categories: *opportunity, volition, compulsion and inducement.*

Currently there are only two studies related to gambling in South Carolina, from which we might draw inferences about why people gamble. The first study, the *Preliminary Report of the Quinn-Pike Gaming Study*, revealed just how widespread pathological gambling had become in South Carolina.[410] The second study, *An Economic Analysis of Machine Gambling in South Carolina*, concerned itself with the economic impact video poker had on South Carolina and provided some useful information related to pathological gambling's co-morbidity.[411] After a brief description of these studies we will discuss what their data has to say about "why people gamble," in terms of *opportunity, volition, compulsion and inducement.*

A. Preliminary Report of the Quinn-Pike Video Gaming Study

In this study a team of researchers surveyed the gambling behaviors and attitudes of 600 video poker players on site at licensed gambling locations throughout South Carolina. The surveyed sites were randomly selected from the South Carolina Department of Revenue's list of licensed gambling locations and were drawn from all forty-six counties. The instrument used in this research, the *Video Gaming Device Interest Survey*, gathered data ranging from demographic information (e.g. age, sex, income, education and marital status) to gambling inducements (e.g. large jackpots, sex, advertisements and food) to the behavioral, cognitive and emotional experiences of the gambler.[412]

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[410] Cathy Pike & Frank Quinn, *Preliminary Report of the Quinn-Pike Video Gaming Study* (Dec. 22, 1997) *available at* http://poptop.hypermart.net/qpvpoker.html (Dec. 22, 1997). This report was presented to the Hon. Judge Joseph Anderson as part of a suit against the video poker operators in South Carolina. *Id.*

[411] William N. Thompson & Frank L. Quinn, *An Economic Analysis of Machine Gambling In South Carolina* (May 18, 1999) (unpublished report presented to the The Education Foundation of the South Carolina Policy Council) (on file with author).

[412] *The Video Gaming Device Interest Survey* was developed by Dr. Cathy Pike of the University of South Carolina for use in a statewide survey of video poker players. A full text of this survey is enclosed in the appendix of the report.

There was no attempt in this study to gather gambling prevalence data, since there was a promise from then Governor Beasley's office to fund a prevalence study if Beasley were re-elected. Unfortunately, the subsequent pro-gambling administration of Governor Hodges did not seem interested in this type of information. However, this study provided a snapshot of the people actually playing video poker in South Carolina, documented the numerous violations of the law by the gambling industry and debunked many common myths about gambling in South Carolina.

B. An Economic Analysis of Machine Gambling in South Carolina

Dr. William Thompson of the University of Nevada at Las Vegas developed a model for examining the economic impact of gambling on a state economy, and in this study his model was applied to South Carolina.[413] Previously, Dr. Thompson's mod-

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Throughout the 1990's, the South Oaks Gambling Screen (SOGS) was the instrument used by the majority of experts to determine what constituted a *pathological gambler* as well as a *problem gambler.* The SOGS related more to *prevelance* issues. Also, it should be noted that the studies herein predated the 1999 *Final Report* of the National Gambling Impact Study Commission. For the classic article on the South Oaks Gambling Screen see Henry R. Leisieur & Sheila B. Blume, *The South Oaks Gambling Screen (SOGS): A New Instrument for Identification of Pathological Gamblers*, 144 AM. J. PSYCHIATRY 1184, 1184-87 (1987).

[413] Dr. William Thompson's model for assessing the economic impact of gambling in a specific area is often referred to as a "bathtub model." *An Economic Analysis of Machine Gambling in South Carolina*, *supra* note 411, at 3. His model focuses on the fluidity of money in an economy directly related to gambling and suggests that gambling has a positive impact only if the inflow is greater than the outflow. An Economic Analysis of Machine Gambling in South Carolina, *supra* note 263, at 3. The model consists of three basic steps: (1) Identify all the inflow of money into the economy due to gambling; (2) Identify all outflow of money in the economy due to gambling; (3) Assess how these inflows and outflows impact the economy. *An Economic Analysis of Machine Gambling in South Carolina*, *supra* note 411, at 3-5.

One method of calculating inflows is to determine what percentage of gamblers are nonresident and estimating how much they spend gambling and on other goods and services while visiting the area to gamble. *An Economic Analysis of Machine Gambling in South Carolina*, *supra* note 411, at 3. Outflow may be calculated by tracing where the money goes after it is gambled (e.g. what percentage of the money leaves the local economy to pay for gambling machines, services or supplies). *An Economic Analysis of Machine Gambling in South Carolina*, el demonstrated gambling had a positive economic effect on the economy of Wisconsin which became a net negative when social costs were included.[414] Thompson's model also concluded that there was a negative economic impact on the economy of Illinois.[415] When this model was applied to South Carolina it revealed that, although the video poker machines took in $2.5 billion per year, the net economic effect was a loss of almost $420,000,000 per year.[416] As part of this research, a survey of South Carolina's Gamblers Anonymous groups was conducted in order to ascertain costs associated with pathological gambling, and this data provided the basis for the only co-morbidity statistics available at present demonstrating the relationship between pathological video poker playing and a host of other problems.[417]

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supra note 411, at 3. Finally, a calculation must be made of added costs to a local economy such as increased costs to law enforcement and regulatory agencies, increased crime, costs associated with pathological gambling and money lost to the local economy when locals spend money on gambling instead of local goods and services. *An Economic Analysis of Machine Gambling in South Carolina*, *supra* note 411, at 3.

The direct local economy gain-loss can be easily calculated once the inflows and outflows are calculated. In South Carolina the model revealed that for $1.00 coming into the state related to gambling, a dollar and $1.34 leaves the state. *An Economic Analysis of Machine Gambling in South Carolina*, *supra* note 411, at 11. When indirect costs such as pathological gambling (these costs were based on a survey of the local Gamblers Anonymous groups) were added to the direct costs, outflow outpaced inflow by over $200,000,000. *An Economic Analysis of Machine Gambling in South Carolina*, *supra* note 411, at 26. Finally, a more sophisticated analysis using multipliers (x2) was employed, and it demonstrated that South Carolina actually lost $400,000,000 a year to its economy due to gambling. *An Economic Analysis of Machine Gambling in South Carolina*, *supra* note 411, at 26.

[414] *See also*, William Thompson, Ricardo Gazel & Dan Rickman, *The Economic Impact of Native American Gaming in Wisconsin,* 8 WIS. POLICY RESEARCH INST. REPORT (1995).

[415] William Thompson, Ricardo Gazel, & Dan Rickman, *The Social Costs of Gambling in Wisconsin*, 9 WIS. POLICY RESEARCH INST. REPORT, July 1996, at 16-17. William Thompson & Ricardo Gazel, *The Monetary Impacts of Riverboat Casino Gambling in Illinois*, (June 11, 1996) (on file with author).

[416] *An Economic Analysis of Machine Gambling in South Carolina*, *supra* note 411, at 2, 26.

[417] *An Economic Analysis of Machine Gambling in South Carolina*, *supra* note 411, at 14. "Co-morbidity" consists of "the co-occurrence of two or more disorders in a single individual." NGISC REPORT, *supra* note 3, at 7-3. Fifty-six of the respondents identified themselves as currently active in Gambler's Anonymous, the

C. Opportunity

The term *opportunity* refers to the accessibility an individual has to gambling. Thus, opportunity can be measured in terms of legality of gambling, the distance to the nearest gambling venue or even the number of gambling venues present in an area.

Since the opportunity to gamble illegally seems always to be a possibility there is no strong argument that the opportunity to gamble is existent only when it is legalized. There is, however, a positive relationship between illegal gambling and the opportunity to gamble legally. Research confirms that when gambling becomes legal in an area, the opportunity to gamble illegally also *increases*.[418] From 1868 until 1993, the only form

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other twenty-four pathological gamblers did not identify themselves as currently active in Gambler's Anonymous. *An Economic Analysis of Machine Gambling in South Carolina*, *supra* note 411, at 14. The results of this study were first presented in *Co-morbidity Issues in the Treatment of Pathological Gambling in South Carolina* by Dr. Frank L. Quinn, October, 15, 1999, at a conference sponsored by the South Carolina Center for Gambling Studies and held at Columbia College. The findings were then later presented at national and international conferences in South Dakota and Australia. The total number of respondents was eighty, with sixteen (20%) reporting no co-morbid pathology, although 11 out of 16 (68.75%) of the no co-morbidity group reported suicidal ideation. The survey resulted in the following statistics for co-morbidity with pathological gambling:

Alcohol addiction	30%	Drug addiction	18.75%
Depression	57.5%	Bi-polar depression	12.75%
Eating disorders	23.75%	Compulsive shopping	22.5%
Anxiety Disorder	2.5%	Obsessive compulsive	2.5%
Sexual addiction	2.5%	Gulf War Syndrome	1.25%

The following were reported as "due to gambling."

Suicidal ideation	77.5%	Suicide Attempt	18.75%
Divorced/Separated	48.4%	Missed work	71.4%
Wrote bad checks	54.4%	Filed for bankruptcy	25.7%
Lost/Quit a job	27.1%	Stolen from work	37.1%
Arrested	41.0%	Subject to lawsuits	52.8%

An Economic Analysis of Machine Gambling in South Carolina, *supra* note 411, at 15-18.

[418] Judith Hybels, *The Impact of Legalization on Illegal Gambling Participation*, 35 J. OF SOC. ISSUES 27, 35 (1979). Part of this phenomenon is related to the

of legalized gambling in South Carolina was charitable bingo. Illegal gambling existed in various forms such as sports betting, cock fighting, office pools, card games and golf course hustling, but these had little impact on the state economy. There was also a network of illegal video machine gambling throughout the state, though its full extent cannot be determined. Thus, the opportunity to gamble in South Carolina was limited to illegal gambling or forays to states where gambling was legal. Prior to the legalization of video poker in 1993 it could be argued that most, but not all, of South Carolina's pathological gamblers came from or gambled in another state.

Data gathered by the National Gambling Impact Study

"sin tax" generally placed on legalized gambling, which in turn makes illegal gambling less expensive while making gambling more socially acceptable.

The National Gambling Impact Study Commission Report lists ten criteria used by the American Psychological Association to diagnose pathological gambling. NGISC REPORT, *supra* note 3, at 4-1, 4-2. These criteria include a preoccupation with gambling; the need to gamble with increasing amount of money to achieve the desired excitement; restless or irritable behavior when attempting to decrease or stop gambling; gambling as a way of escaping from problems; returning to gamble after losing money, or chasing one's losses; lying to family members, therapists or others to conceal the extent of involvement with gambling; repeated unsuccessful efforts to control, cut back or stop gambling; committing illegal acts to finance gambling; jeopardizing or losing a significant relationship, job, or education or career opportunity because of gambling; and relying on others to provide money to relieve a desperate financial situation caused by gambling. NGISC REPORT, *supra* note 3, at 4-1, 4-2. "Problem gambling" is described as gambling that exceeds the "normal" purpose of gambling, which is "fun, recreation, or entertainment." North American Association of State & Provincial Lotteries (NASPL), *Problem Gambling FAQ*, *available at* http://www.naspl.org/compgamb.html.

Pathological gambling is considered more serious than problem gambling. The American Psychiatric Association (APA) classifies pathological gambling as an "impulse control disorder." NGISC REPORT, *supra* note 3, at 4-1, 4-2. The NASPL defines pathological gambling as

> A chronic inability to resist the impulse to gamble. The term is usually limited to cases where the gambling causes serious damage to a person's social, vocational, or financial life. Often referred to as compulsive gambling and less frequently as disordered gambling, it is considered by most to be an impulse control disorder.

NASPL, *supra*; *see also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUEL OF MENTAL DISORDERS § 312.31 at 615 (4th ed. 1994) [hereinafter DSM-IV], also *available at* http://www.naspl.org/compgamb.html ("The essential feature of [p]athological [g]ambling is persistent and recurrent maladaptive gambling behavior . . . that disrupts personal, family, or vocational pursuits.").

Commission in 1999 suggests that the rate of pathological gambling can grow by as much as 50% if there is a casino within fifty miles.[419] Being near a casino represents opportunity, and it is this proximity that Robert Custer argued was one of the key elements in the development of pathological gambling.[420] Although South Carolina possessed no casinos—unless you count the numerous *video malls* (clusters of 25-100 video poker machines housed in dim-lit double-wide trailers)—there is no doubt this type of convenience gambling using video poker machines rivaled the impact of most casinos. South Carolina compensated for its lack of a true destination casino by licensing bars, car washes, restaurants, night clubs, laundromats, bus stations, convenience stores, hair salons, truck stops, bowling alleys, coffee shops, gas stations and even business offices to operate video poker machines. Any place of business more than 200 feet from a church or school could become a licensed gambling site. By 1999 there were over 7,000 licensed gambling sites in South Carolina. As a result, residents had *more opportunities to gamble there than in any other state including Nevada*.[421] There was virtually nowhere in the state where someone could not reach a gambling site by driving a half-hour or less.

The South Carolina Department of Revenues records were often questioned because they relied heavily on self-reporting from the gambling industry, but by 1999 they reported over 36,000 licensed video poker machines in South Carolina.[422] If that number was accurate, the state possessed one video poker machine for every one hundred residents *including children*. Sixty-one percent of the video poker players surveyed in 1997 said that this proximity contributed to the frequency and length of their gambling.[423] *After 1993 the opportunity to gamble in South Carolina was as common as buying a loaf of bread or a gallon of milk.*

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[419] NGISC REPORT, *supra* note 3, at 4-4 (citing National Opinion Research Center, *Gambling Impact and Behavior Study, Report to the Nat'l Gambling Impact Study Comm'n*, (Apr. 1, 1999).

[420] *How Problem Gamblers Can Get Help!* U.S. NEWS & WORLD REP., Jan. 28, 1980, at 75. In this interview, Robert Custer, who is widely regarded as the "father of pathological gambling researchers," stated that the two most important elements in the development of pathological gambling were *proximity* and *payoff*. *Id.*

[421] Plotz, *supra* note 55, at 63, 64.

[422] South Caroline Department of Revenue, Video Game Machine Quarterly Reports (1999) (unpublished report, on file with author).

After gambling is legalized in an area, the opportunity to gamble is often controlled through regulations. Such regulations generally limit the opportunity to gamble by limiting hours of play, designating sites, limiting payouts and most importantly deciding *who* can gamble.[424] Naturally these regulations only limit the opportunity to gamble when they are enforced, but when the regulations are lax, and their enforcement is lax, the opportunity to gamble actually increases.[425]

South Carolina presented the unique experience of having appropriate regulations to limit play which were not enforced (e.g. winnings were capped at $125/24hr setting, but this cap was routinely ignored) and inappropriate regulations which actually increased the opportunity to gamble (e.g. no age limit to play video poker). The Commission Chairperson, Dr. Kay James, literally stopped the National Gambling Impact Study hearings in disbelief when the expert from South Carolina told her there was no underage gambling problem in his state.[426] The entire commission gasped, including the decidedly pro-gambling members, when the expert went on to explain that there was no underage gambling problem in South Carolina because at that time South Carolina law allowed anyone of any age to play video poker. The law did require that players had to be at least twenty-one *to collect winnings from the video poker machines.*[427]

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[423] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410.

[424] NGISC REPORT, *supra* note 3, at 3-2. The National Gambling Impact Study Commission recommended that "[S]tates should not authorize any further convenience gambling operations and should cease and roll back existing operations." NGISC REPORT, *supra* note 3 at 3-18.

[425] *An Economic Analysis of Machine Gambling in South Carolina*, *supra* note 411. For a further examination of how regulations can be used to limit gambling and pathological gambling, see Frank Quinn, *First Do No Harm: What Could be Done by Casinos to Limit Pathological Gambling,* 22 MANAGERIAL & DECISION ECON. 133, 142 (2001).

[426] Dr. Frank Quinn testifying on convenience gambling before the N.G.I.S.C. in Las Vegas first reported to the Commission that there was a state (South Carolina) whose view of gambling regulation was so cynical that it not only did not attempt to protect underage gamblers, but actually by law allowed them to gamble with no hope of winning. Dr. James could not believe this and sent an assistant out of the room to check the facts while Dr. Quinn was still testifying. NGISC REPORT, *supra* note 3, at 7-23.

With 36,000 video poker machines in over 7,000 convenient locations, citizens of the Palmetto State were afforded ample opportunity to gamble. Added to this convenience was a dearth of gambling regulations and almost nonexistent enforcement. Within five years of legalizing gambling South Carolina presented not only unique opportunities to gamble, but also unique opportunities to develop pathological gambling. The situation was so bad that one leading expert from Las Vegas referred to the state of gambling in South Carolina as a return to the "old wild west."[428]

D. Volition

Apologists for the gambling industry often say "people gamble because they want to." Indeed, prevalence studies report that almost 90% of the population of the United States admits to having gambled, suggesting that most people want to gamble at sometime.[429] However, if we ask the question "why

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[427] S.C. CODE ANN. § 12-21-2804(c) (repealed 1999). "No person under the age of twenty-one may receive payouts as a result of the operation of the machines licensed under § 12-21-2720(A)(3)." *Id.*

[428] Experts termed South Carolina as the "wild west" of gambling/video lottery terminals, and this remark accurately described the situation in South Carolina and was often repeated by researchers from highly restricted/regulated states such as Nevada. See, for example, this term as used by Dave Shiflett, *Gambling and Its Discontents*, THE AMERICAN SPECTATOR, March 1999, at 41, 46. *See also* NGISC REPORT, *supra* note 3, at 2-4, 2-5, 2-6.

[429] The findings of the National Opinion Research Center at the University of Chicago, Gambling Impact and Behavior Study (April 1, 1999) (unpublished report, on file with author) (later incorporated into the National Gambling Impact Study Commission's Final Report) suggest that the prevalence of lifetime gambling in the United States is about 86% of the population which is up from 68% in 1976.

See also Howard Shaffer, Mathew Hall & Joni Vander Bilt, *Estimating the Prevalence of Disordered Gambling Behavior in the United States and Canada: A Meta-analysis* (Dec. 15, 1997) (unpublished study by the Harvard Medical School Division of Addictions, on file with author). This study, chiefly financed by pro-gambling interests and prompted by the gambling industry's Washington, D.C. lobbying group, focuses primarily on the specific population of people who have do people gamble" slightly differently and query "why do people choose to gamble" the answers can generally be divided into two major camps of response: *excitement* and *escape*.[430]

Some forms of gambling such as horse racing and casino table games are often associated with *excitement* or *arousal*.[431] It is easy to discern the external signs of excitement when participants are engaged in this type of gambling activity because they yell, jump up and down, scream inanities and hug complete strangers. Arousal while participating in this form of gambling is usually quantified by techniques such as measuring increases in heart rate.[432]

Gambling as an *escape* is most often associated with electronic machines, bingo and other repetitive activities such as slots.[433] The external signs exhibited by escapist gamblers are glazed trance-like stares and repetitive machine-like movements. The level of *escape* or *dissociation* experienced by a gambler is generally quantified by a questionnaire or a player's inability to register other stimuli while playing.[434]

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gambling problems but identifies a range of non-problem gamblers of 93%-97%.

[430] The website for the Georgia lottery advises players "to play responsibly–it's all about fun." Georgia Lottery, Message from the President, *available at* http://www.georgialottery.com/lottery/lotteryabout.html. Although there are many reasons listed in the literature, most can be categorized as an attempt to become aroused (excitement) or an attempt to decrease arousal (escape). It has been suggested that women are more likely to use gambling as an escape and men are mote likely to gamble for excitement. *See* Henry Lesieur & S.B. Blume, *When Lady Luck Loses: Women and Compulsive Gambling*, *in* FEMINIST PERSPECTIVES ON ADDICTION 181-197 (Nan Van Den Bergh ed., 1991).

[431] G. Anderson & R. Brown, *Real and Laboratory Gambling, Sensation Seeking and Arousal*, 75 BRIT. J. PSYCHOL. 401, 406-08 (1984).

[432] Mark Dickerson et al., *Chasing, Arousal and Sensation Seeking in Off-course Gamblers*, 82 BRIT. J. ADDICTION 673, 673 (1987). *See also* Andree Coulombe et al., *Erroneous Perceptions and Arousal Among Regular and Occasional Video Poker Players*, 8(3) J. GAMBLING STUD. 235, 242 (1992).

[433] Shelia Specker et al., *Psychopathology In Pathological Gamblers Seeking Treatment*, 12(1) J. GAMBLING STUD. 67, 78 (1996).

[434] Katherine Diskin & David Hodgins, *Narrowing of Attention and Dissociation in Pathological Video Lottery Gamblers*, 15(1) J. GAMBLING STUD. 17, 19 (1999). For a summary of the criticisms of the financial aura exercised by pro-gambling interests in the context of the *Journal of Gambling Studies*, particularly after 1996, see John W. Kindt, *The Costs of Addicted Gamblers: Should the States Initiate Mega-lawsuits Similiar to the Tobacco Cases?*, 22 MANAGERIAL & DEC. ECON. 17, 31-32 (2001).

Video poker may owe its addictive nature to the fact that it seems to produce both elevated levels of *excitement* and *escape* in players. Although video poker is rarely associated with arousal/excitement, it has been demonstrated that players often have increased heart rates when playing, even though video poker players only seem to overtly demonstrate arousal when they are not playing.[435] In the survey of video poker players in South Carolina, only 34.4% of the players associated excitement with playing video poker.[436]

Electronic gambling in general, and video poker specifically, are viewed as repetitive, mindless playing experiences in which determined players often enter a trance-like state similar to highway hypnosis.[437] Regular video poker players often report losing all sense of time and the consequence is extended periods of play resulting in larger losses and often devastating secondary consequences.[438] Some players have even complained about winning because it slows down the rate of play and breaks the trance.

The reason that people choose to play video poker is complicated and perhaps varies between subgroups, but research suggests that escape is the leading reason many people choose this form of gambling.[439] Of particular interest is the fact that as a group women seem to prefer video poker to other forms of gambling and that perhaps it is the escape afforded by this game that is attractive to them.[440] Given the odds of winning at video poker and the acknowledged risk in playing against a computer we can surmise that video poker players must be trying to escape reality.

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[435] K. Leary & M. Dickerson, *Levels of Arousal in High and Low-frequency Gamblers*, 23 BEHAV. RES. & THERAPY 635, 640 (1997).

[436] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410.

[437] Diskin & Hodgins, *supra* note 434, at 17-19.

[438] Diskin & Hodgins, *supra* note 434, at 26-27. Perhaps the most common experience reported by regular video poker players who seek treatment is that they often loose all track of time once they start playing regardless of whether they are winning or losing. This phenomenon has been validated in conversations with other therapists such as Dr. Robert Hunter in Las Vegas and Dr. Valerie Lorenz in Maryland. There are numerous stories of individuals leaving small children or pets in extreme heat or cold for hours while they played video poker. *See, e.g.*, *The Victims of Video Poker*, *supra* note at 408.

[439] *See* HAROLD J. WYNNE, A DESCRIPTION OF PROBLEM GAMBLERS IN ALBERTA: A SECONDARY ANALYSIS OF THE ALBERTA STUDY DATE, REPORT TO ALBERTA ALCOHOL & DRUG ABUSE COMMISSION 43-46, 106-07 (1994).

[440] Robert Hunter, Problem Gambling In a Gambling Town: The Experience of

E. Compulsion

Some people can not *not* gamble. The phenomenon of compulsive gambling is best described in Durand Jacobs' *General Theory of Addictions* as an interplay between the physiology, environment and psychological state of the gambler, but it still remains that when confronted with the opportunity, some people will gamble compulsively.[441] The clinical term for this behavior is *pathological gambling*, and the criteria for this diagnosis were first listed in the American Psychiatric Association's *Diagnostic and Statistical Manual*.[442] In the general population of the United States the prevalence of pathological gambling is said to range from 0.8% to 3.0%, and is significantly

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Las Vegas, Address Before the Eighth International Conference on Risks and Gambling (Aug. 1989) (on file with author).

[441] Durand F. Jacobs, *A General Theory of Addictions: A New Theoretical Model*, 2(1) J. GAMBLING BEHAVIOR 15, 30 (1986). In 1990, the *Journal of Gambling Behavior* became the *Journal of Gambling Studies*; *see supra* note 434 and accompanying text.

[442] DSM-IV, *supra* note 418, at 312.31, at 615. Pathological gambling is classified as an impulse control disorder and grouped with disorders such as kleptomania. In order to receive a diagnosis of pathological gambling an individual must present five or more of the following criteria:

1. Preoccupation with gambling (e.g. reliving past gambling experiences, planning to gamble, or thinking of ways to finance gambling).
2. Needs to gamble with increasing amounts of money to achieve desired excitement. (tolerance)
3. Repeated unsuccessful attempts to control, cut-back or stop gambling.
4. Becomes restless or irritated when attempting to cut-back or stop gambling.
5. Gambles to escape problems or relieve dysphoric mood.
6. After losing money gambling, returns again to "get even".
7. Lies to family and others to conceal the extent of gambling involvement.
8. Commits illegal acts in order to finance gambling.
9. Jeopardized or lost significant relationships, jobs or opportunities because of gambling.
10. Relies on others to provide money to relieve a desperate financial situation caused by gambling.

DSM-IV, *supra* note 418, at 312.31, at 616.

higher in states which have legalized gambling.[443]

There has never been a gambling prevalence study completed in South Carolina, but in 1997, there was a non-scientific "man-in-the-street" poll which might shed some light on the prevalence of video poker.[444] Using an "Ancient Mariner" technique (stopping every third pedestrian), a researcher positioned himself on the mainstreet of Columbia, the state capital, and briefly surveyed willing participants. An amazing two thirds of the respondents admitted to having played video poker during the previous twelve months. Even more amazing, almost 16% of the respondents self-identified themselves as having a "problem with playing video poker." A more scientific statewide survey of video poker players performed later that year found that 20% of the players met the criteria for pathological gambling.[445] By the late 1990's, South Carolina had an inordinate number of people who gambled due to their compulsion.[446]

F. Inducement

In his classic work, *The Psychology of Gambling*, Walker states *"It is a difficult problem to understand why people gamble at all, but far more difficult to understand why a person will borrow, steal, defraud, lie, break a range of promises, prove irresponsible, and commit a range of crimes all in order to gamble."*[447] One response to Walker's question is that people perform a wide array of inappropriate behavior in order to gamble because they are *induced*.

Inducements are usually defined as anything that can be used to encourage an individual not only to gamble but to gamble more frequently or longer.[448] Some inducements are generally legal and are associated with any legitimate business, such as providing a comfortable environment, e.g., air conditioning is very important to most businesses during the South Carolina summers.[449] Some inducements, such as sexual favors, are generally considered illegal and are not employed by legitimate businesses. Gamblers are accustomed to receiving a variety of inducements ranging from free food and drinks to lavish hotel rooms to world-class entertainment frequently "comped" at large Las Vegas casinos. Perhaps the most effective inducement to gamble is the lure of winning large sums of money or prizes.[450]

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[443] NGISC REPORT, *supra* note 3, at 4-5.

[444] In preparation for the *Quinn-Pike Survey*, a small sample was taken in Columbia, South Carolina to help the researchers prepare for the larger statewide study. This sample was referred to as *The Psychology of Gambling Survey*. The data collected was meant only for in-house use, in order for the researchers to understand the breadth of video poker. The responses shocked the researchers, because the data suggested a much higher prevalence rate than anticipated and a pathological gambling rate that seemed astronomical. *The Psychology of Gambling Survey* (unpublished survey, on file with author). They later learned that the pathological gambling rate was actually low for video poker players. *Id.*

[445] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410.

[446] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410.

[447] WALKER, *supra* note 409, at 9.

Realizing that inducing people to gamble is similar to giving away first-class cabins on the Titanic, legislative bodies generally restrict how individuals can be induced. In South Carolina, the legislature made it illegal to offer anyone a "special inducement" to gamble.[451] The South Carolina Legislature's intent may have been to limit how patrons were lured to gamble, but the state's enforcement record seemed to actually allow any inducement. The self-centered logic of the operators allowed them to argue that they did not lure patrons with the inducement of large jackpots, while at the same time, arguing that if they had to comply with the $125 payout limit they would go broke. Obviously there is some subjectivity in what actually works as an inducement to gamble, e.g., one person might respond to free food while another is attracted by scantily-clad wait staff. Therefore, it is important to ask the video poker players and not just the legislators or the operators, what constitutes an inducement.

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[448] *See, e.g.,* S.C. CODE ANN. §§ 12-22-750(A) & 710(A)(3) (2000).

[449] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410.

[450] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410. Although it would seem illogical that gamblers think that they can *win large sums of money*, many do. In the South Carolina *Quinn-Pike Survey*, 43% of the players reported that the lure of large jackpots made them play longer and more often. *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410. This seems to confirm Robert Custer's assertion that *payoffs* were one of the major factors in inducing people to gamble.

[451] S.C. CODE ANN. § 12-21-2804(B) (2000). The Video Game Machines Act prohibits the offering of any special inducements to a person for the playing of video game machines. *Id.* Therefore, any attempt to influence a person to play video games is an inducement and is strictly prohibited by statue. *Id.*

Respondents to the *Quinn-Pike Survey* were asked which inducements actually effected their gambling behavior.[452] The players were provided with a list of inducements widely thought to be offered by gambling establishments and given the following instructions: *Below are some things that video playing houses do for their customers. Which of these has been made available to you and encouraged you to play longer or more often.*[453] The responses of the players provided some insight into what actually works as an inducement and to what extent the operators may have been evading the law. Below is a breakdown of the player response rates to both legal and illegal inducements.

LEGAL INDUCEMENTS	
Video machines close to home (proximity)	61.9%
Friendship or social ties with employees (affiliation)	35.9%
ATM in or near location (convenience)	35.0%
Exciting place to be (arousal)	34.4%
Information when machine was hot	24.4%
Treated like a special person	15.1%
"Set ups" for "brown bags"	05.8%[454]

ILLEGAL INDUCEMENTS	
Alcohol on site	46.9%
Large Jackpots	43.5%
Free or discounted food	29.6%
Bonus System	22.4%

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[452] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410, at App. A.

[453] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410, at App. A.

[454] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410, at App. A.

Advertising	12.9%
Owners giving easy credit	11.5%
Sexual companionship	10.2%
Owners covering or holding checks	09.0%[455]

A quick review of the information provided by the players seems to validate the statement made by Robert Custer years ago that the most important factors attributable to one's gambling behavior and the subsequent development of pathological gambling were *proximity* and *payoff*.[456] Sixty-one point nine percent (61.9%) of the players identified having a video machine close to home (proximity) as an inducement to their playing, while 43.5% said large jackpots (payoffs) were inducements to their playing.[457]

The number one illegal inducement to gamble, according to the players, was having alcohol on site (46.9%).[458] South Carolina law forbids having a gambling license and a license to sell and serve alcohol in the same location, thus in theory precluding clubs, restaurants and convenience stores from also operating gambling devices.[459] The South Carolina Department of Revenue, which issued both the alcohol and gambling licenses, complained that it was unable to determine whether an establishment had one of these licenses before issuing the other due to computer problems. This inability to enforce the law amounted to a huge inducement by the state to gamble. By not enforcing this law South Carolina was subjected to an explosion in the number of gambling locations and the availability of alcohol in many of them.

The South Carolina law limiting individual winnings to $125 per a twenty-four hour sitting would appear to eradicate large jackpots as an inducement. However, reports of payouts as high as $20,000 were not uncommon, and the machines themselves routinely posted jackpots hundreds of times higher than allowed by law. Clearly, the law was not being followed, and for 43.5% of the players surveyed, the lure of large jackpots was an inducement to play longer or more often.[460]

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[455] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410, at 8.

[456] *How Problem Gamblers Can Get Help!*, *supra* note 420, at 75.

[457] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410, at 8-9.

[458] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410, at 8.

[459] S.C. CODE ANN. § 12-21-2804(B) (2000); *see also* S.C. CODE ANN. §§ 12-22-750(A) & 710(A)(3) (2000).

Another unusual finding of the survey was that almost thirteen percent (12.9%) of the players reported being induced by advertising.[461] What makes this unusual is that advertising was prohibited by law.[462]

Perhaps the most astounding finding of the survey was that over ten percent (10.2%) of the players reported that they were induced to play with sexual companionship. While reports of sexual acts being performed on players remain anecdotal, it appears most of these respondents were actually referring to sharing the company of "live naked girls" in topless clubs while they played video poker.[463]

Finally, 78% of the respondents to the Quinn-Pike survey reported that they gambled more often or longer due to illegal inducements and fifty-five percent (55%) of the players reported at least two illegal inducements while almost a third (28%) reported three or more illegal inducements.[464] Clearly, one of the reasons South Carolinians chose to gamble, even at risk to their own well being, was that they were illegally induced to do so.

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[460] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410, at 8.

[461] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410, at 8.

[462] S.C. CODE ANN. § 12-21-2804(B) (2000). The Video Game Machines Act states that no person who maintains a place or premises for the operation of video game machines may advertise in any manner for the playing of the machines. *Id.* This portion of § 2804(B) was held to violate the Constitution of the United States. Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 535 S.E.2d 642 (S.C. 2000) (holding that statute prohibiting video gaming operators from advertising playing of video gaming machines violated First Amendment).

[463] *See Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410, at 8. *See generally* Chris Vander Doelen & Jacqueline Smrke, *Counsel Poised to License Sex Industry*, WINDSOR STAR, April 8, 1996, at A1; Mike Smith, *Casino Party Proves Pricey*, EVANSVILLE COURIER & PRESS, July 30, 2002 (pointing out existence of $2.26 million fine to an Indiana casino "on allegations it entertained guests with prostitutes").

[464] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410, at 10.

By the dawning of the millennium, South Carolina had all the necessary ingredients in place to become the best example of gambling at its worst. South Carolina's answer to "why do people gamble" is really quite simple. When people are offered 7,000 gambling locations (opportunity), the most popular gambling venue (volition), the most addictive form of gambling (compulsion) and illegal rewards such as alcohol, sex and money (inducement) they will *choose* to gamble. Video poker flourished in South Carolina primarily because all the restraints established to limit the impact of gambling were either ignored or circumvented with a wink and a nod from the guardians of the republic.

It is clear that the inducement to gamble is a product of all these factors combined–opportunity, volition, compulsion and inducement. The form of gambling that combines these factors to the greatest degree is the most irresistible and hence the most profitable. It is also apparent that the most irresistible and potentially addictive form of gambling created thus far is "convenience gambling," comprised of self-contained, portable electronic machines delivering a visually and auditorily stimulating selection of fast-paced games of chance. Such machines produce an absorbing and near-hypnotic mini-world in which the player is psychologically isolated, immersed in a world whose immediate reality excludes everything but the struggle with chance in pursuit of a great reward. It is as if life experience itself–with its strong hope and pursuit of victory ultimate rest and security–is distilled into an electronically replicated event available on every street corner for a few dollars and the push of a button. In South Carolina, the collection of over $2 billion from a population almost half of which earns less than $20,000 a year attests to its power. The average player progressively becomes more and more like the totally obsessed man in G.K. Chesterton's *The Maniac*, "He is in the clean and well-lit prison of one idea: he is sharpened to one painful point. He is without healthy hesitation and without complexity."[465]

No wonder the National Gambling Impact Study Commission recommended the abolition of this type of gambling (convenience gambling). Yet, it remains logistically the easiest form to deliver and the most difficult to regulate. The examples of South Carolina and Georgia are a reminder that the only practical approach to this gambling activity is outright abolition.

G. Why Are Video Poker Machines So Addictive?

Often pathological gambling is viewed as a "pure addition" because the addict does not ingest a drug.[466] This stance is bolstered by Jacob's *General Theory of Addictions* which relies heavily on predisposing factors and the development of an "Addictive Personality Syndrome" to account for pathological gambling.[467] Whether you accept the idea of "necessary but not sufficient causes" or not, it is clear that some activities possess a stronger potential for addiction than others. It is this acknowledged addictive potential which earned video poker the title of "the crack cocaine of gambling."[468]

The addictive nature of video poker first gained national attention when Robert Hunter's study of pathological gamblers in Las Vegas revealed that 95% of the women only played video poker and over 80% of the men in Gambler's Anonymous groups saw video poker as their main problem.[469] These would be incredible statistics anywhere, but in a town like Las Vegas, where you can gamble on pretty much anything, they are a testament to the allure and addictiveness of video poker as compared to almost all other forms of gambling. In South Carolina, where the only legal competition to video poker was charitable bingo, there was no contest.

Though all forms of gambling present the opportunity to foster addiction, video poker appears to be more efficient at delivering the most addiction producing characteristics in one venue. As one group of researchers asserted, "There are specific features of a gambling stimulus that promote persistence of and/or return too play . . . these features are present and maximized in video lottery machines."[470] These features include but are not limited to:

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[465] 1 THE COLLECTED WORKS OF G.K. CHESTERTON 225 (David Dooley ed., 1986).

[466] Weisenhutter describes compulsive gambling as the "original addiction." *See* ROBERT WILDMAN, GAMBLING: AN ATTEMPT AT AN INTEGRATION 120 (1998).

[467] Jacobs, *see supra* note 441, at 20-29.

[468] Hunter, *supra note* 440.

[469] Hunter, *supra note* 440.

1. The illusion of skill, which promotes the illusion of control
2. The ability to promote dissociative-like experiences
3. The ability to quickly switch from one type of game to another
4. Immediate reinforcement with multiple stimulus cues
5. Variable levels of betting and variable rates of play
6. Frequent near misses and small wins[471]

Additionally, the video poker machines in South Carolina possessed the following characteristics that contributed to the development of pathology:

1. Large jackpots
2. No cash payouts, but a riding credit system
3. Ubiquity/familiarity
4. An environment of no constraints and conducive to excess[472]

The following is a brief discussion of how all these factors combined in South Carolina to make playing video poker there dangerously pathological.

The illusion of skill. A belief that they exert some *control* over the outcome of a risk-taking venture is perhaps the single most important factor in promoting persistent and prolonged gambling.[473] Although the only skill involved in playing video poker against a machine with a random number generator is the ability to read, players are often adamant in their belief that their skill made them more likely to win. Logically, if an individual thinks they have no control over the outcome and that the house has even a small advantage they are less likely to continue to play, because it is easy to demonstrate that over time this small advantage is all that is needed to wipe them out.[474] Therefore, continued play requires a belief that promotes the illusion of control through a system or skill. In turn this irrational belief system supports irrational gambling behavior. Video poker players often report that their "skill" at determining when a machine is "hot" is based on the logic that if a machine has not paid off recently it will soon and thus they would "be a fool to quit now." This is an example of the "gambler's fallacy" and periodically of luck, which suggests that one can predict random events or even control them, by studying brief patterns in random behavior.[475]

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[470] Timothy Morgan et al., *Video Lottery Gambling: Effects on Pathological Gamblers Seeking Treatment in South Dakota*, 12(4) J. GAMBLING STUD. 452 (1996). This group provides an overview of the research on what specific features have proven to contribute to pathological gambling and which of these features are incorporated in video poker machines. *Id.*

[471] *Id.* at 452-53.

[472] *Id.*

The ability to produce dissociative-like experiences. Almost from their inception, video poker machines have been known for their ability to induce a trance-like state in players and to allow players a sense of escape.[476] This trance-like experience has been compared to dissociation, a psychiatric term used to describe an experience in which "an individual experiences temporary alterations in normally integrative functions of consciousness, identity or motor behavior."[477] Initially this experience was reported by players who "lost all track of time" and played as though hypnotized for hours. Later this phenomenon was replicated in experiments demonstrating that players often not only lost track of time but also developed difficulty responding to external stimuli other than the video screen.[478] There is something about this phenomenon that seems to disproportionately attract or effect women.

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[473] The earliest work in this area is attributed to Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311, 311-28 (1975); *see also* WILDMAN, *supra* note 466, at 43-48 (discussing various studies of illusion of control).

[474] French mathematician, Blaise Pascal, developed a mathematical proof that demonstrated how one individual (or the house) given a very small edge in odds, a large enough amount of capital and sufficient time can bankrupt any opponent. This is referred to as the theory of *Gambler's ruin*. It is this principle that casinos employ with games that payout 95% of what they take in. For a broader examination of Pascal's work related to gambling see, PETER L. BERNSTEIN, AGAINST THE GODS: THE REMARKABLE STORY OF RISK 57-72 (1996).

[475] The *gambler's fallacy*, also referred to as the Monte Carlo effect, describes the belief by gamblers that random events are not truly random, but are some how effected by proximal events. Thus one would believe that the odds of a coin toss are effected by the previous toss.

A similar belief is the *periodicity of luck*. This belief suggests that luck runs in streaks. Thus, if a gambler bets on black four times in a row and loses, he may continue because he believes black is due.

The ability to quickly switch from one type of game to another. Each video poker machine might be best thought of as a miniaturized electronic casino. The machines in South Carolina offered twelve to sixteen different games on each terminal. Most of these games were variants of poker, blackjack or keano. If a player were to tire of one game or attempt to "change their luck," all they had to do was touch the screen and select another game, which could be done in three to five seconds. This ability to switch games rapidly contributes to players playing longer, which contributes to the development of pathology.[479]

Immediate reinforcement with multiple stimulus cues. From their sometimes provocative titles to their flashing lights and ringing bells, video poker machines are designed to arouse patrons through a variety of stimulus responses. To understand the impact of multiple stimulus cues compare the impact of watching MTV to listening to a CD or duck hunting with a shotgun as opposed to a rifle. The use of multiple stimulus cues however may not be as important as the immediacy of the reinforcement. The ability of video poker machines to immediately reinforce play through a variety of auditory and visual cues contributes significantly to continued play.[480]

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[476] Hunter, *see supra* note 440, at 2-5 and 2-6.

[477] DSM-IV, *supra* note 418, at 415-418.

[478] Diskin & Hodgins, *see supra* note 434, at 17-28.

[479] Morgan et al., *see supra* note 470, at 452.

[480] Morgan et al., *see supra* note 470, at 452; *see also* Mark Dickerson, *Internal*

Variable levels of betting and variable rate of play. The video poker machines used in South Carolina mostly allowed for minimum bets of a quarter, although the machines only took bills and gave no change, but bet size was determined only by how much a player was willing to stuff into the machine and put at risk. The ability to vary the bet size contributes to the illusion of skill, and some players believe that the outcome is affected by the level of bet, which leads them to believe that they could control the outcome by varying their bet size.[481] Another factor contributing to this sense of control is the ability of players to vary their rate of play. This may seem insignificant given the average player could play seven to twelve hands a minute, but once more, it is the illusion of control that contributes to continued play.[482]

Frequent near misses and small wins. Just like their cousin, the slot machine, video poker machines are capable of generating "near misses." When asked what a hand consisting of an Ace, King, Queen, Jack and Nine means, the appropriate response would be NOTHING!! However, it is difficult not to think, "I *almost* made a royal flush!". This is also reenforced by small wins, which based on the odds is the most one can expect. It has been demonstrated that players remember their wins, even small ones, and often downplay their losses.[483] The combination of small wins and "almost wins" convinces players to keep playing because the big win is just around the corner.[484]

As noted above, video poker machines were made more addictive in South Carolina by some other factors: large jackpots, no cash payouts but a riding credit system, ubiqui-

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and External Determinants of Persistent Gambling: Problems in Generalizing From One Form of Gambling to Another, 9(3) J. GAMBLING STUD. 225, 236-39 (Fall 1993) (discussing role of learning and role of cognitions with regard to excessive gambling).

[481] Morgan et al., *supra* note 470, at 452.

[482] Hunter, *supra* note 440.

[483] Thomas Gilovich, *Biased Evaluation and Persistence in Gambling*, 44 J. PERSONALITY & SOC. PSYCHOL. 1110-26 (1983).

[484] WILDMAN, *supra* note 466, at 56-60; *see also* WALKER, *supra* note 409, at 140-45.

ty/familiarity, and an environment of no constraints and conducive to excess. Below is a brief description of how these factors contributed to the development of pathology.

Large jackpots. South Carolina law limited winnings to $125 per day, but this law was rarely enforced.[485] The logic was that if the most you could win was $125 then you would not be tempted to risk more than $125. However, machines often boasted of jackpots of tens of thousands of dollars which induced many people to risk large sums of money with the hope of winning larger sums of money.

No cash payouts but a riding credit system. The video poker machines did not give an immediate payout, but rather ran a tab of credits. This maintained the rate of play by not slowing a winner down when gathering winnings, and encouraged players to play winnings as opposed to pocketing some. When a player did wish to quit, the machine would print out a credit ticket, but many establishments had a minimum amount for which they would payoff. This encouraged players to play until they had no credits left.[486]

Ubiquity/familiarity. With over 7,000 licensed gambling locations it was hard to find a convenience store, restaurant, bar or gas station that was gambling free. Video poker machines were everywhere. This meant that more people became exposed to gambling and associated it with everyday life. Not only did this lead to more people gambling for the first time, especially women, but it also meant that if someone wished to stop gambling they were confronted with the opportunity almost constantly.[487]

An environment with no constraints and conducive to excess. South Carolina's lack of enforcement of the restraints on video poker led players and operators to believe that anything goes. This contributed to the development of gambling pathology in a myriad of ways, such as:

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[485] *See generally* S.C. CODE ANN. § 12-21-2804(B) (2000); *see also* S.C. CODE ANN. §§ 12-22-750(A) & 710(A)(3) (2000).

[486] Psychology of Gambling Survey, *supra* note 444.

[487] *See generally, Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410.

1. Unenforced time restrictions allowed for non-stop playing seven days a week.
2. Unenforced location limits allowed for the wide spread of gambling sites.
3. Unenforced jackpot limits induced gamblers to risk more.
4. Unenforced loss limits allowed gamblers to be ruined financially.
5. Unenforced alcohol laws allowed gamblers to gamble while impaired.
6. Unenforced age limits—there were no age limits to enforce.[488]

As we have seen, South Carolina became the best place to become a pathological gambler by doing the worst job of protecting its citizens from opportunists armed with an array of technologically sophisticated and psychologically potent methods for robbing them.

V. WHAT DID WE LEARN ABOUT GAMBLNG FROM THE SOUTH CAROLINA EXPERIENCE?

South Carolina proved to be a unique laboratory for the study of gambling behavior and pathology. More specifically it demonstrated the destructive power of video poker and convenience gambling. Perhaps the lessons learned in the Palmetto state will prevent the same mistakes to be made elsewhere.

Lesson 1: Video poker is addictive. In the South Carolina survey, roughly 20% of the players met the DSM-IV criteria for pathological gambling.[489]

Lesson 2: Minorities and women seem particularly vulnerable to video poker. In response to items related to problem gambling on the survey of South Carolina video poker players women scored about the same as men, even though women pathological gamblers are historically outnumbered by men pathological gamblers, and African-Americans scored consider-ably higher than the total sample.[490]

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[488] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410.

[489] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410.

Lesson 3: People sometimes gamble more often or longer because they are induced. Seventy-eight percent of the players in South Carolina said that they received at least one illegal inducement and that it affected their play.[491]

Lesson 4: Sometimes people gamble and develop pathology because they have the opportunity. When the video poker machines were banned from South Carolina in July of 2000, pathological gambling in South Carolina did not magically disappear. However, within ninety days the *number of active Gambler's Anonymous groups in South Carolina fell from a high of thirty-two to sixteen,* with several of the still active groups reporting the size of their group meetings *diminishing from an average of almost forty to one or two (as of January 1, 2003 there were only eleven active Gambler's Anonymous groups in South Carolina). Additionally, the most active gambler's hotline in the state reported the number of calls they were receiving fell from over two hundred a month to zero.*[492]

Lesson 5: The pathology associated with video poker may be largely *non-transferable*. This statement is at odds with much of the commonly accepted theory of addictions and when it was presented at the National Gambler's Anonymous annual meeting in 1999, by Dr. Quinn, it was met with marked skepticism. The fact remains that in spite of the governor's best efforts to lure ex-video poker players to the state-run lottery the number of Gambler's Anonymous groups has continued to decline since video poker was outlawed.

Lesson 6: Finally, the South Carolina experience reveals how easily the high long-term economic and social costs of gambling are ignored by a political process obsessed with short-term and visible financial gain. We learn that many politicians are prone to view gambling as a balm for their political parties' ailing fortunes, and that state governments gravitate to it to solve their budgetary woes. This combination sometimes produces a trade-off that conceals and perpetuates extensive economic and social harm to the state's poorest and most vulnerable citizens. The politician or the political party favored by gambling money strains to accommodate gambling enterprises, so that the tax benefit to the state is suppressed to a bare minimum to permit enormous profits for the gambling operator. No attention is paid to the differing impact of different types of gambling, and the most destructive, psychologically potent and addictive form of gambling invested thus far—video gambling—is unleashed on an uninformed public. The end result is minimal but highly visible fiscal benefit to the state accompanied by an enormous but less visible harm to the public. If the Food and Drug Administration employed the same standard of care and accounting used by the average state government dealing with gambling, half of us would already be dead.

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[490] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410.

[491] *Preliminary Report of the Quinn-Pike Video Gaming Study*, *supra* note 410.

[492] In early October of 2000, Dr. Frank L. Quinn surveyed the active Gambler's Anonymous groups in South Carolina and talked with GA representatives. These findings were first presented in *Two Days in October: The Past and Present Impact of Video Poker in South Carolina* at the National Coalition Against Gambling Expansion (NCAGE) National Conference, "The Rise and Fall of American Gambling" on October 14, 2000 in Sioux Falls, South Dakota (on file with author).

VI. CONCLUSION

The "Progressives" of the late nineteenth and early twentieth century left us with the comfortable assumption that some element of our state or federal governments will use law and law enforcement to protect the safety and well-being of the average citizen more fully than in former times. Political parties are also often seen as responsible protectors of their core constituencies, who contribute their votes and money to support their chosen party. It is, therefore, truly interesting to note that the biggest losers in the South Carolina gambling epoch were consistently and overwhelmingly the traditional constituents of the Democratic Party– minorities and the relatively less affluent. Yet the political drive to create and protect video gambling was centered in the very top levels of the Democratic Party (the lead lawyer for the video poker industry is the current chairman of the State Democratic Party, and the Democratic governor, Jim Hodges, rode into office on gambling money). In fact, the languishing Democratic Party became a powerhouse between 1993 and 1998, largely through its alliance with gambling operators, who had built up an unprecedented stable of lobbyists over those years.[493]

A cynic, with some historical accuracy, might describe the enormous transfer of wealth that occurred in South Carolina between 1993 and 2000 as an increasingly partisan process.[494] Instead of receiving financial support directly from their constituency, the leaders of the Democratic Party in South Carolina made an alliance with gambling operators that insured a steady and significant flow of cash from an "industry" whose profits were derived largely from the party's core constituency—the socioeconomic bottom quarter of the state's population.

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[493] As of spring, 1998, thirty of the state's forty-six senators shared $81,850 contributed by video poker interests since 1992, and they collected another $48,100 from law firms and business groups representing gambling operators. Michael Sponhour, *Poker's Senate Hand Video Gambling Interests Contribute to Key Players*, THE STATE (Columbia, S.C.) March 1, 1998, at A1. Though the Republican-controlled House had voted to ban video poker outright as of June 1, 1999, the Democrat controlled Senate formed the resistance to reform. *Id.* Thirteen senators in particular had led efforts to block the video poker ban voted by the House, including Charleston Senator Robert Ford, who had received $13,500 from gambling interests since 1992. The issue is not strictly partisan, however. Republican Senator Ty Courtney, a senate video gambling supporter, represented gambling interests and borrowed $60,000 from Horace Drew Andrews III, one of the state's larger operators, as well as an undisclosed amount from another operator, J.M. Brown. *Id.* It is also true that many legislators received contributions from gambling interests and yet voted against them on one or more issues. In the South Carolina legislature, the successful strategy of the gambling operators was comprised of maintaining a sufficient hold on the state Senate to block any anti-poker initiatives. When pro-gambling Democrat Jim Hodges won the 1998 gubernatorial election, the threat of a veto of any pro-gambling measure was removed, and an assured veto of any anti-gambling measure was achieved. *Id.*

[494] The critical vote in the South Carolina Senate that produced Act No. 125, which the supreme court employed to kill video poker, revealed strong opposition to video poker among Republicans and strong support among Democrats. Interview with Sen. Wes Hayes, *supra* note 174. There were three avowedly pro-poker Senators among the Republicans; three were uncommited, while sixteen were opposed to it. In contrast, there were fourteen pro-poker Democrats, five uncommitted, and five against it. Interview with Sen. Wes Hayes, *supra* note 129. Despite the fact that over 40% of the approximately $900 million in profits that video gambling took in during its last year came from the pockets of largely minority customers with an average income of less than $20,000, the most solid support for continued gambling has come from the house's Black Caucus. Sid Gauldin, *State Takes Shot at Casino Boats*, CHARLESTON POST & COURIER, Jan. 27, 1999, at A1.

There were numerous pro-gambling Republicans and some stanch anti-gambling Democrats, but the gambling industry found its voice in the Democratic Party. The real genius of the Democratic Party was in allying itself with an industry whose profit center was not ordinary arms-length customers, but rather was comprised of participants in a compulsive and progressively addictive form of social behavior. The Democratic Party's single-most significant supporters–video poker operators–used the Democratic Party's main constituency as its cash cow. The Democrats had realized the politician's dream: not just to convince donors to give, but to make political contributions addictive. Economic support for the party could then go beyond political ideology and rest instead, on a genuine personal compulsion that, for ever-growing numbers, became literally irresistible. A great many of the players had not reached the point of genuine addiction, but even these players could not win. The whole spectrum of video gambling users, from first-time novice to addict, became a reliable source of money. This is not meant to suggest any predisposition of the Democratic Party to favor gambling as a general policy. Surely the gambling operators would just as readily have paid Republicans committed to protect and shelter them. Rather, it demonstrates the gambling operators' strategy of seeking out political targets of opportunity and enticing them with cash. Whenever the gambling industry can co-opt a target very high up in the political hierarchy, such as the governor's office, or can paralyze one branch of the legislature (both of which it did in South Carolina), their investment can yield staggering returns. Even if they are outlawed, they can occasionally walk away from the broken families, lost jobs, bankruptcies, and general socioeconomic decay they have caused, and still keep the money. Additionally, like a hoard of locusts that have stripped a field or been driven from it, they can swarm into another. Modern technology allows scores of compact gambling machines to convert any community into an oversized casino.

The political alliances that developed in the South Carolina experience also underscore one of the real contrasts between private gambling and public gambling, such as a state-run lottery. A state-run gambling enterprise cannot use gambling proceeds to fill the purse of any one political party, though it can affect the spoils available to the party in power. There is in fact a natural tendency for a state-run gambling operation to broaden political support for whatever form of gambling is used. For example, the Georgia lottery, first enacted in 1993, supports the "Hope Scholarship", which pays all tuition and fees at state colleges and universities to any resident who maintains a "B" average.[495] As described by the *New York Times*:

> Most starkly, the scholarship represents an enormous transfer of money—$1.2 billion since 1993—from lottery players, who tend to live in the poorest counties of the state, to 504,000 college students, who come from the wealthiest counties. The program has become one of the most popular middle-class entitlements, and politicians who champion it are often rewarded at the ballot box.[496]

No one has yet promoted a public lottery as a means of transferring winnings back to the players who make it profitable, and the lower socio-economic groups that are the backbone clientele of the lottery do not play in the hope of receiving some small rebate down the road. At least in the public lottery, the profits are spread around more than those from private gambling.

Also, it may be argued that the majority of the citizens of South Carolina really got what they wanted. When the Republican Governor of South Carolina came out forcefully against video poker in 1998, and his Democratic rival formed a profitable alliance with gambling operators to resist him, the people at least got to vote. The pro-gambling candidate won. Yet the publicity campaign developed by the Democrats and their gambling allies stressed the public lottery as a fix for the state's dismal educational record. The Democratic politicians and their party were able to gain political support from targeted groups that received state benefits paid for by lottery profits, and the group providing the profits was excited by even the remotest chance of transcending their luckless existence. Likewise, the citizens never voted to endorse seven years of illegal gambling. Until the furor following the *Johnson* case, the public was unaware that the South Carolina Democratic Party leadership championed an "industry" that literally laid waste to its gullible, hapless constituency, and that they did so proudly, eagerly and aggressively. This only underscores the fact that the tools of government finance make as much difference as the goals of government.[497]

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[495] David Firestone, *Free-Tuition Program Transforms a University*, N.Y. TIMES, Feb. 4, 2001, at A16.

[496] *Id.* at A10.

However, the real problem is not just the distribution of the profits, but also of concern is the way they are earned, and from whom they are earned. Gambling is a tool that invidiously exploits human weakness and desperation, and it increases in its destructiveness in direct proportion to the length of time it is pursued by the individual. Its impact also varies in direct relationship to the accessability of the gambling opportunity, and the manner in which the game is constructed: from the immediacy of a single-user machine with instant payoff available on every street corner to the state-run lottery with its lower per-use cost and longer odds.

Gambling also tends to disproportionately to destabilize individuals and families at the lower socio-economic levels, which makes a progressive rise to a middle-class existence impossible for greater and greater numbers. In the case of public gambling dedicated to some ostensibly attractive purpose, such as education, it is divisive, creating a habit of reliance by those who have much on the resources of those who have little. It is an extreme form of regressive taxation dis-

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[497] The recent revelations about the non-existent Social Security "Trust Fund" provide a good case in point. Additionally, it is worth noting that the Pentagon operates over 8,000 slot and video poker machines on United States' bases around the world, netting the Department of Defense $125 million a year out of the paychecks of its own military personnel. *Gambling Not A Danger to Military Study Finds, "Isolated Instances" of Negative Impact*, WASH. POST., Dec. 2, 2001, at A6. Perversely, the income is largely recycled to provide for family picnics and other "morale boosters" like bowling alleys and golf courses. Joshua Kurlantzick, *Gambling's Royal Flush*, U.S. NEWS & WORLD REP., May 20, 2002, at 36; *see also* Craig Lambert, *Trafficking In Chance*, HARVARD MAG., July-Aug. 2002, at 32.

guised as entertainment. It allows the state to expand its revenues by retailing a product that allocates the costs of a worthy goal, such as education, disproportionately, just as it permits a disproportionate sharing of the benefits. Rather than raise taxes in an open democratic process where the costs and benefits of a proposed program can be debated, public gambling allows the state to raise revenue by selling a product whose very nature allocates the costs of public works on a relatively underrepresented and defenseless segment of society, while solidifying political allegiance among select beneficiaries. Just as the targeted beneficiaries of state-run gambling develop a dependency on gambling revenues, politicians almost invariably become so attached to gambling as a new source of government revenue that the demerits of gambling are ignored. For example, in 1991, members of the South Carolina legislature tried to close the secretly created loophole by which gambling first crept into South Carolina in 1986. Key Democratic Senators rallied to support legalized video gambling because licensing fees for video machines added approximately $30 million to state revenues. Democratic Senator Nikki Setzler stated, "If the loophole was closed, we would have been $30 million short, and that would have caused a major tax increase."[498] Senator John Land, also a pro-gambling member of the Senate Finance Committee where Jack Lindsay had presided, said, "We simply could not afford to give up $30 million."[499] Even Governor Jim Hodges, the former foe of video gambling who became its biggest supporter in the gubernatorial race of 1998, argued in

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[498] *Groups Backing Video Poker Bet On Power of Purse, supra* note 68.

[499] *Id.* The friendly alliance between government and gambling based on money has been frequently observed. *See* William R. Eadington, *Contributions of Casino Style Gambling To Local Economies*, 556 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 53, 57 (1998):

> The role of governments and other benefactors is particularly noteworthy. Political realities often make such groups the silent partners of gambling enterprises. The main rationale for the legalization or the liberalization of gambling laws may be to expand the financial basis of these silent partners.

Id.; *see also* ROBERT GOODMAN, LEGALIZED GAMBLING AS A STRATEGY FOR ECONOMIC DEVELOPMENT (Ctr. Econ. Dev. U. Mass.-Amherst (1994)); ROBERT GOODMAN, THE LUCK BUSINESS (1994).

1990, before his "conversion", that increasing state revenue from gambling operations "weds the state to use of machines even more than we already are."[500]

In short, state-run gambling amounts to traditional progressivism in reverse.[501] It generally requires the poorest part of society to give to the richest, which provides government revenue that becomes an irresistible alternative to taxes for politicians. Again, many may find some overall fairness in this process, but at least its characteristics should be openly recognized.

Likewise, a close look behind the judicial treatment of gambling in South Carolina is informative. The South Carolina Supreme Court made its first foray into the subject before the true face of video gambling was fully visible. The overwhelming majority in the state had no idea of the social and economic storm that was headed its way, nor did anyone know the full extent of organized gambling's intentional evasion and subversion of the law. In fact, stealthy evasion of public attention and legal regulation is critical to the initial assault that gambling typically launches when it moves into new territory.

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[500] Cindi Ross Scoppe, *Hodges in New Role Defending Gambling Governor Hopeful Betting on Lottery, Video Poker Fees*, THE STATE (Columbia, S.C.), Oct. 28, 1997, at B1. For an excellent review of the manner in which gambling money unbalances the public decision-making process, see John Warren Kindt, *U.S. National Security and the Strategic Economic Base: The Business /Economic Impacts of the Legalization of Gambling Activities*, 39 ST. LOUIS U. L.J. 567 (1995). Indeed, it seems routine for state legislatures to fixate on potential revenue wile ignoring the potential problems with gambling. *See* Kevin McDermott, *Casino Operators Hint That Layoffs Might Help Pay Hefty New Tax Bill*, ST LOUIS POST DISPATCH, Dec. 4, 1997, at C4. The author discusses the Illinois legislature's 1997 plan to add $57 million in taxes on the state's largest "floating casinos" in order to fund education and to end restrictions that placed Illinois riverboat gambling at a disadvantage to that in neighboring states. *Id.*

[501] *See generally* Ronald J. Rychlack, *Lotteries, Revenues and Social Costs: A Historical Examination of State Sponsored Gambling* 34 B.C. L. Rev. 11 (1992). Another excellent source for information on state-run lotteries is provided by the North American Association of State and Provincial Lotteries (NAASPL) at *http://*www.naspl.org/fuq.html.

States either earmark lottery proceeds for one or more specific purposes (Georgia), or simply put them in the general revenues (Florida). Virginia began its lottery as a means of enhancing general revenues, but a constitutional referendum held in November, 2000, resulted in a constitutional amendment requiring proceeds to be used for education. *State Lotteries Approved,* THE STATE (Columbia, S.C.) Nov. 8, 2000, *available at* http://www.usatoday.com/news/vote2000/sc/state01.htm. The NAASPL reports that earmarking lottery funds frequently reduces the proportional share of the designated recipient's in the overall budget, since other parts of the budget demand proportionally more revenue over time. In other words, earmarked lottery proceeds sometimes "replace rather then supplement money directed toward the identified programs" leaving the recipient projects funds to decline in proportion to later budget expansion in other areas.

The minority in the South Carolina Supreme Court's 1998 lottery opinion recognized the majority's departure from prior state jurisprudence, which was in accord with the Anglo-American majority view prevailing since the late seventeenth century.[502] However, after the disclosures from the federal case in *Johnson* had become widely known and had altered public opinion and the Court had been provided with a statutory basis for action, the Court unanimously handed the video gambling industry their death sentence in the year 2000.[503]

The federal district judge in *Johnson* became for awhile the only judicial official in the State willing and able to tackle the gambling industry head-on. A federal circuit court of appeals halted this district judge's award of injunctive relief to stop massive violation of the State's gambling laws, and to be fair, there is much disagreement about the extent of a federal court's inherent equitable powers. But the Fourth Circuit also chose to forestall further judicial interference with gambling under a legal principle that clearly became irrelevant after the disappearance of gambling as a "regulated" industry. Even more importantly, it also attempted to halt the *future* enforcement of the private civil remedies provisions of Rackateer Influenced and Corrupt Organizations (RICO). RICO is one of the most significant federal statutes designed in part to protect private citizens from systematic illegally conducted gambling (which no one seriously disputes was the case in South Carolina). The Fourth Circuit Court of Appeals did this to avoid future federal interference with state regulation of an industry that had ceased to exist. It stayed the district court from considering RICO causes of action, which were dependent upon interpretations of state law, although the South Carolina Supreme Court had taken the unusual step of expressly approving the district judge's reading of state law, and the Fourth Circuit refused to specify what those potentially "disputed" issues might be or how or when they might be raised and resolved. In practical terms, the court rejected a broad range of legal restraints on gambling sought by private litigants, but embraced broad-based restraints on the litigants who might interfere with gambling.[504] The South Carolina Supreme Court, had the final word on the meaning of South Carolina law, which it found to be clear. But before an independent federal district judge engaged the South Carolina Supreme Court through certified questions, a pro-gambling Governor and an obtuse Department of Revenue along with an obstroctive minority of the State Senate and a protective Fourth Circuit Court of Appeals for seven years managed to stall the enforcement of the most significant consumer protection law in the history of the state, to the loss of billions of dollars taken from the state's poorest, and the social and familial destruction of many of its most vulnerable citizens.

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[502] Johnson v. Collins Entm't Co., 508 S.E.2d 575, 583-85 (S.C. 1998).

[503] Joytime Distribs. & Amusement Co. v. South Carolina, 528 S.E.2d 647, 649 (S.C. 1999).

When considering the measured pro-gambling statements of lobbyists and politicians today, it is interesting to note that the entire saga of gambling in South Carolina, from birth to death, involved the collection of enormous profits by an "industry" that never spent a full day obeying the law.[505] No one can read the mountain of factual evidence and the summary of Judge Anderson in his order of April 28, 1999, and fail to recognize the presence of a business dedicated to intentionally violating the law.[506]

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[504] Whatever one concludes about the court's position on federal injunctive relief, their effort to stall the garden variety enforcement of civil RICO is extremely unusual.

[505] *Regulators Must Not Cut Poker Operations Any Slack*, THE STATE (Columbia, S.C.), Oct. 22, 1999, at A14:

> But let's remember what we're dealing with here. This is not a benign industry whose members work hard at being good corporate citizens. This is an industry that has grown through a deliberate strategy of systematically and repeatedly disobeying every meaningful law that the state of South Carolina has tried to impose.

What lessons may we learn from all of this?

First, judicial proclamations on straightforward, fundamental constitutional principles (such as federalism–the mutual accommodation of state and federal power) occasionally may be viewed with healthy skepticism. In the *Johnson* case, the ostensibly deferential pronouncements of the Fourth Circuit Court of Appeals actually obstructed the first-ever vindication of state gambling law by undermining RICO's support for declared state policies that had been nullified by unrestrained lawbreaking and the paralysis of law enforcement. Contrary to the Fourth Circuit's declarations, it was the persistent and courageous action of a single federal district judge that worked to rescue the letter and spirit of state law through repeated certification of key issues to a receptive South Carolina Supreme Court. By attempting to gut the pro-state, supportive effect of RICO under the banner of states' rights, the court of appeals undermined the usefulness of one of the few federal statutes actually designed to help the states achieve the objectives contained in their own laws. Under our legal system, statutes duly passed by a legislative assembly are still the most authentic voice of the law. Setting them aside for whatever motive can hardly be called a public service. When a judicial body takes "the dramatic, some would say bold, step" of setting them aside for purposes "of their own making," they perform a service for neither the federal nor the state government.[507] This is also yet another example of the merits of dividing power at many different levels so that the failure of one part does not necessarily mean the failure of the whole. It is also another example of engaging the resources of the public by linking criminal laws to a private civil action, a device RICO carries forward from English law of the seventeenth century.

Second, whenever gambling money underwrites the highest executive office in a state and consequently influences the chief executive's choice of essential administrative and law enforcement personnel, you know you are in trouble. The laws regulating gambling, including essential consumer protection principles like the South Carolina $125 winnings limit, will *not* be enforced.

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[506] *See generally* Johnson v. Collins Entm't Co., 88 F. Supp. 2d 499 (D.S.C. 1999), *vacated by* 199 F.3d 710 (4th Cir. 1999).

[507] Johnson v. Collins Entm't Co., 199 F.3d 710 (4th Cir. 1999), *reh'g denied en banc*, 204 F.3d 573, 577 (4th Cir. 2000).

Third, video machine gambling is the most destructive gambling activity ever devised. It insinuates portable technology into every corner of a state, and the technology *will be used for illegal gambling*, no matter what the law or regulations say. Like terrorism, this form of gambling probably cannot be eliminated entirely, but it must be combated with hard and strong laws. A casino the size of a whole state is a land of trouble, of rising bankruptcies, disintegrating families, escalating crime, damaged productivity and lost opportunity. The actual costs of this trouble is borne in the first instance by the poor, the uniformed and the young, and in the final instance by the taxpayer.

Fourth, once gambling has established itself politically and financially, it takes a long war and a lot of luck to keep it from dominating state government or to get rid of it. The wisest course is to learn from those (like South Carolina) who have endured such trouble and to deal openly with the issue of gambling before the inevitable damage and corruption it bring occurs. The issues and problems connected with gambling are never fully solved, and they can only be contained or held in remission by continuous vigilance. The vigilance can not come from an administrative arm of a pro-gambling government, but must come from legal forces unaffected by political complicity or indifference. RICO is a good example of such a force.

Lastly, though the gamblers are off the streets in South Carolina and all their unsightly and sordid accouterments have been hauled off, all of those elsewhere who turn an eye to this enduring human problem can be sure of one thing: they are headed your way.

BENDING TOWARD JUSTICE: JOHN DOAR AND THE "MISSISSIPPI BURNING" TRIAL

Douglas O. Linder[*]

"If we can crack Mississippi," the students said, "we can crack segregation anywhere."[1] All other civil rights groups in 1964 considered Mississippi—the most impenetrable state in the union—hopeless.[2] The radical decision of Bob Moses and other leaders of the Student Non-Violent Coordinating Committee (SNCC) to "shake up"[3] the state by sending six hundred young volunteers into every corner of the state to register new black voters brimmed with danger. Moses, the twenty-nine-year-old black director of the Mississippi Summer Project—considered a saint by those who worked with him—,[4] explained to a first gathering of student volunteers that Mississippi could only be understood by being there—like racism itself, it could not be understood abstractly.[5] J. Res Brown, one of four Negro lawyers in the state, had an ominous warning for the students: "You're going to be classified into two groups in Mississippi: niggers and nigger-lovers, and they're tougher on nigger lovers."[6]

When John Doar told Mississippi Summer Project volunteers, "There is no federal police force—the responsibility for protection is that of the local police,"[7] many in the crowd booed the forty-two-year-old Justice Department official. "They were hostile," Doar later recalled.[8] "I hadn't thought through their likely reception to my comments. When the students started to hammer me, I thought I'd been set up a little."[9] As Deputy Chief of the Civil Rights Division, Doar had a responsibility to spell out the interpretation of separation of powers adopted by the Johnson Administration. The Justice Department would only authorize the FBI to investigate after a federal crime was committed. In addition to the question of the FBI's legal authority, the agency lacked the manpower to provide protection for six hundred students wandering in and out of rural Mississippi counties over an entire summer. Nonetheless, Doar recalled, "the SNCC kids were pushing hard to get the federal government into a position of protecting students."[10]

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[1] Calvin Trillin, *Letter from Jackson*, NEW YORKER, Aug. 29, 1964, at 94.

[2] *Id.* at 105 (Comment of James Forman, SNCC Executive Secretary).

[3] *Id.* at 104.

[4] *Id.* at 96.

[5] TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65 353 (1998).

[6] Claude Sitton, *Students Warned on Southern Law*, N.Y. TIMES, June 19, 1964, at 16.

Doar, as the Deputy Chief of the Justice Department's Civil Rights Division, sympathized very much with the objectives of the students assembled for a weeklong training session at the Western College for Women in Oxford, Ohio. "I admire what you intend to do," Doar told two hundred Summer Project trainees in his speech. "The real heroes in this country today are the students and particularly those students who have given their time, energy, and dedication to correct the very bad and evil problems in the South with respect to the way in which American Negro citizens are treated before the law."[11]

Among the crowd listening to Doar on June 19, 1964, were three idealistic young men who the next day would be heading south to Meridian, Mississippi to begin a summer of work registering blacks to vote. Mickey Schwerner was a good-natured twenty-four-year-old native New Yorker who was in his sixth month as a Mississippi-based field worker for the Congress of Racial Equality (CORE). White supremacists despised Schwerner, known to them as "Goatee" or "Jew-Boy," for having organized a boycott of a store in Meridian that depended heavily on black customers, but had never hired a black employee. Schwerner had come to Ohio with his chief aide and companion in Meridian, James Chaney. Chaney, age twenty-one, was a shy African-American who had come to the CORE office in his hometown to help the movement in any way he could. The recruit Schwerner and Chaney found to bring back with them to Mississippi was Andrew Goodman, an intelligent, unassuming twenty-year-old Queens College student from Manhattan's Upper West Side.[12]

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[7] SETH CAGIN & PHILIP DRAY, WE ARE NOT AFRAID 32 (1988).

[8] Interview with John M. Doar, prosecutor in *United States v. Price*, in Rockford, Ill. (Nov. 6, 1999).

[9] *Id.*

[10] *Id.*

[11] Claude Sitton, *U.S. Official Warns Mississippi-Bound Students*, N.Y. TIMES, June 20, 1964, at 12.

Schwerner was anxious to get back to Mississippi. He had received word in Ohio of an assault and church firebombing in Longdale, a small town that he had visited with Chaney two weeks before. About 10:00 P.M. on June 16, a meeting of Mount Zion Church leaders had just broken up. As seven black men and three black women left the church, masked men lined up in military fashion with rifles and pistols blocking their path. The masked men told the church members they were looking for "Jew Boy." Some of the thirty or so armed white men began beating the departing blacks. Someone spread diesel fuel around the inside of the church—then lighted it. Schwerner had hoped to use the Mount Zion Church as a site for a new "freedom school." The first thing he wanted to do when they got back was to travel to Longdale and gather what facts he could about the frightening incident.

In the early morning hours of June 20, Schwerner, Goodman, and Chaney boarded their blue CORE station wagon and left the rolling hills of southwestern Ohio, bound for Meridian. The next day, after a short night's sleep and a breakfast, the three civil rights workers were again in their wagon, heading northwest toward Longdale.

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[12] *See generally*, WILLIAM B. HUIE, THREE LIVES FOR MISSISSIPPI 54-77 (1968); CAGIN & DRAY, *supra* note 7, 1-65, 162-96, 245-77.

John Doar's courage was well known to his classmates at St. Paul's Academy in Minneapolis. In the final game of the 1939 football season, St. Paul's unbeaten team met its archrival, Blake. In the final quarter of a close game, Blake drove the ball deep into St. Paul's end of the field. Classmate Ted Brooks recalled, "Three times John Doar stood alone between the Blake ball carrier and the goal line. He nailed the guy. Three crunching tackles. We won 7-0. He was fearless."[13]

It was a quality that served him well in the South. In Jackson, Mississippi, in the wee hours of June 12, 1963, a sniper waited in a honeysuckle thicket near the driveway of Medgar Evers, a thirty-seven-year-old national field secretary of the Mississippi NAACP. When Evers walked from his car to the front door of his house, the gunman shot and killed him. Three days later, black dignitaries, including Dr. Martin Luther King, Jr. and Roy Wilkins, were in Jackson to attend the assassinated civil rights leader's funeral and participate in a silent march. After the march in 100-degree heat ended, several hundred young blacks refused to disperse. They swept down Farish Street toward the main white business district singing "This Little Light of Mine" and clapping hands. A battalion of helmeted riot police in short-sleeved shirts and sunglasses formed a line to stop them. When Deputy Police Chief A. L. Ray ordered the demonstrators to go home, the young blacks began throwing bricks, stones, and bottles in the direction of the police line. "We want the killer! We want the killer!"[14] the crowd chanted. Demonstrators in the rear began stomping feet and shouting "Freedom! Freedom! Freedom!"[15] Police dogs went berserk and were yanked back by their leashes. Cursing police officers drew pistols or began swinging riot clubs. Merchants along Farish Street hurriedly bolted their doors.

Into the no-man's land between the police and the rioters walked John Doar. The crowd stopped for a moment, stunned as though they were watching a ghost. Then bottles, bricks and other missiles began crashing around him. Doar called to the crowd. "You're not going to win anything with bottles and bricks,"[16] he said. He could hardly be heard above the roar of the crowd, which began to encircle him. A man with a tire iron lifted it and took aim at Doar's head. An angry black woman yelled in his face, "We get our rumps shot up!"[17] She asked with sarcastic disgust, "Are we gonna wait for *the Justice Department*?"[18] Doar pleaded, "Aw, give us a break."[19] Then he shouted again, "Hold it! Is there someone here who can speak for you people?" One black youth emerged from the demonstrators and joined Doar in the street. "This man is right,"[20] the youth said, pointing at Doar. "My name is John Doar—D-O-A-R," the official called again and again. "I'm from the Justice Department, and anybody around here knows I stand for what is right."[21] He walked toward the mob, shouting—begging—for the crowd to disperse. "Medgar Evers wouldn't want it this way,"[22] he called. In an alley, a CORE worker grabbed a teenager with a rifle who was taking aim at Doar. "Hold hands with me and help us move these people along,"[23] Doar said to some nearby protesters. A few people linked hands and they slowly began to push the mob back from the police line. A massacre was averted. Barricades were removed and a motorized streetsweeper began whisking up the broken glass and other hurled debris.

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[13] Wayne Washington, *Doar Honored for Quietly Seeking Justice*, MINNEAPOLIS STAR TRIB., Oct. 27, 1994, at 1B.

[14] Claude Sitton, *27 Are Arrested in Jackson Riots*, N.Y. TIMES, May 16, 1963, at 1.

[15] *Id.*

President Kennedy called Doar the next day to congratulate him on defusing the dangerous situation.

Thirty-seven years later, when asked about the Jackson incident, Doar's face broke into a still-youthful-looking smile.

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[16] *Id.*

[17] TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63 827 (1988).

[18] *Id.*

[19] *Id.*

[20] Sitton, *supra* note 14, at 1.

[21] Sitton, *supra* note 14, at 1.

[22] MARY ANNE VOLLERS, GHOSTS OF MISSISSIPPI 144 (1995).

[23] *Id.*

"I wasn't concerned about my safety—perhaps I should have been. I never was hit by any of the projectiles, they were sort of skipping in front of me."[24]

The phone rang in John Doar's rambling home in Chevy Chase, Maryland. It was 1:30 A.M. on Monday, June 22, 1964. On the line was Mary King, a staff worker in the Atlanta office of the SNCC. King told Doar alarming news. On the first day of Freedom Summer, three civil rights workers were missing in east central Mississippi. King explained that Mickey Schwerner, Andrew Goodman and James Chaney had set out from Meridian on Sunday morning in a blue station wagon to investigate a church bombing in rural Neshoba County, a known "high risk" area. When the three failed to return in the afternoon as scheduled, movement workers called local hospitals, jails and law enforcement offices. The calls yielded no word on the whereabouts of the civil rights workers. Could Doar help, King asked.

Doar knew Mississippi well enough to be deeply worried. The three might be dead. Doar told King that he was concerned and he would do what he could. But, as Doar told Freedom Summer volunteers just a week earlier, there was no federal police force. He suggested that King call the Mississippi Highway Safety Patrol. After hanging up the phone, Doar alerted the FBI of the disappearance of the civil rights workers.

Two weeks earlier, Doar and Burke Marshall, head of the Justice Department's Civil Rights Division, briefed Attorney General Robert Kennedy on the growing tensions in Mississippi. Since the White Knights of the Ku Klux Klan of Mississippi formed on February 15, 1964, Doar had been getting periodic reports from the FBI on the clandestine group's activities. An April report to Doar told of sixty-one crosses simultaneously burning across the state. KKK membership in Mississippi was exploding in response to stepped-up voter registration drives. Over 10,000 white men made up the membership of twenty-nine "klaverns," or chapters. Equally disturbing was the lack of any political will to counter the KKK with state power. What, Doar wondered, was to stop them?

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[24] Interview with John M. Doar, *supra* note 8.

A 6:55 A.M. call to Mrs. Minnie Herring at the Neshoba County Jail produced the first clue to the mysterious disappearance of the three civil rights workers. Herring, who the previous afternoon had told a caller she had no information about the three, acknowledged to a caller from the Movement's office in Jackson that Schwerner, Goodman and Chaney had been arrested for speeding early Sunday afternoon. She said the three had eaten supper at the jail and then been released around 6:00 P.M. after paying a twenty-five dollar fine. Sheriff Lawrence Rainey, minutes later, confirmed Herring's story.

When Doar received another call from SNCC's Atlanta office at about 6:00 A.M., he reported, "I have invested the FBI with the power to look into this."[25] By noon, Meridian-based agent John Proctor had received orders from the FBI's regional office in New Orleans to dig up what facts he could in Neshoba County. Proctor's afternoon interview schedule included black residents living near Mount Zion Church in Longdale, Sheriff Rainey and Deputy Price in Philadelphia. Rainey told Proctor, "If they're missing, they hid somewhere, trying to get a lot of publicity out of it."[26] Price admitted arresting the three men. He told Proctor that they "told me they had spent the day in the neighborhood of that burned-out nigger church." He added, "I figured they might have had something to do with the church-burning."[27] At the end of his interview, believing his answers satisfied Proctor, Price slapped the FBI agent on the back and said, "Hell, John, let's have a drink."[28]

While Proctor was poking around in Neshoba County,

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[25] CAGIN & DRAY, *supra* note 7, at 319.

[26] Claude Sitton, *Three in Rights Drive Reported Missing*, N.Y. TIMES, June 23, 1964, at 1.

[27] CAGIN & DRAY, *supra* note 7, at 323.

[28] CAGIN & DRAY, *supra* note 7, at 324.

John Doar was at the White House to receive the President's Award for Distinguished Civilian Service. Doar got a handshake at the award ceremony from President Johnson, who praised his "contribution to our democracy as a vigorous champion of equal voting rights."[29] Doar returned to his office to find a barrage of urgent phone messages from Mississippi. He called SNCC's Atlanta office at 4:20 P.M. to relay to Mary King information gathered in the FBI's preliminary investigation. Doar reported that Schwerner, Goodman and Chaney had been released not at 6:00 P.M., as Jailer Herring and Sheriff Rainey first reported, but after 10:00 P.M. The three were last seen after their release driving south from Philadelphia, Mississippi on Highway 19, Doar said. He added that the state patrol had issued an all-points alert.

After calling King, Doar met with Burke Marshall to consider the touchy issue of stepping up federal involvement in the search. Doar urged action, citing the extensive training of the civil rights workers as evidence that they would not have remained out of contact for twenty-four hours unless they were prevented by force from doing so. His view won out. At 5:20 P.M. the Justice Department announced the order of Attorney General Robert Kennedy for a full kidnap investigation under the "Lindbergh Law."

On Tuesday afternoon, day two of the search for the missing civil rights workers, the parents of Andy Goodman and the father of Mickey Schwerner waited with Lee White, counsel to the President, outside the Oval Office. Inside the office, Lyndon Johnson had just taken a call from FBI Director J. Edgar Hoover. A White House aide announced, "The President will see you now,"[30] and the Goodmans and Schwerner were ushered into the Oval Office, where the President was still on the phone. The anxious parents listened as Johnson asked, "They found the car?"[31] Carolyn Goodman recalling the moment later wrote, "I wanted to leap toward his desk and shout, 'Tell me quickly—are they all right?"[32] Hoover had just told the President that the blue CORE station wagon had been found in a swamp northeast of Philadelphia. According to the FBI Director, the car was badly burned—still too hot to touch. "Get back as soon as you have something," the President ordered and hung up. He stood to greet his guests. "I'm sorry to give you this news," said Johnson, as he told the anxious parents the information he had just learned. Taking Carolyn Goodman's hand, the President said, "Ma'am, we'll do everything we can."[33]

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[29] BRANCH, *supra* note 5, at 364.

[30] Carolyn Goodman, *My Son Didn't Die in Vain*, GOOD HOUSEKEEPING, May 1965, at 164.

The crisis in Mississippi occupied the next five hours of Johnson's time. In a meeting with Robert Kennedy, Burke Marshall and Nicholas Katzenbach, Johnson summed up the situation: "There are three sovereignties involved. There's the United States, there's the State of Mississippi, and there's J. Edgar Hoover."[34] The group believed that the zealous FBI Director would be intrigued by the opportunity to penetrate the violent and secret KKK. Hours of debate yielded a consensus on a first step: the Administration would announce that it was sending a high profile envoy to Mississippi to investigate the disappearance of the civil rights workers. Their choice for the job was former CIA Director Allen Dulles.

John Doar was at the Justice Department working late on Tuesday night when he received a call from the Oval Office. It was his boss Burke Marshall telling him to "pull together all the information you have on the Mississippi Klan."[35] Doar assembled a set of FBI memos the Department had received together with a twenty-page speculative report on the Klan written by a summer intern and put them in a three-ring binder. At 10:00 P.M., Doar delivered the requested materials to a chauffeur, who brought them directly to the White House.

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[31] *Id.*

[32] CAGIN & DRAY, *supra* note 7, at 331.

[33] Goodman, *supra* note 30, at 164.

[34] CAGIN & DRAY, *supra* note 7, at 333.

[35] Interview with John Doar, *supra* note 8.

Early the next morning, Doar met with Kennedy, Marshall and Dulles in the Attorney General's office. Someone needed to accompany Dulles to Mississippi. Robert Kennedy suggested Doar. "No federal official knows the territory better,"[36] the Attorney General said. That afternoon Doar and Dulles arrived in Mississippi. The first scheduled meeting was to be with Governor Paul Johnson. Johnson was already on record speculating that the missing men "could be in Cuba."[37]

John Doar had met the Mississippi Governor nearly two years earlier, in another time of racial tension.[38]

On September 26, 1962, a green twin-engine Cessna dropped from thick clouds above the Oxford-University Airport. On board the plane was Doar, Federal Marshal James McShane, and a twenty-nine-year-old Air Force veteran named James Meredith, who hoped to become the first Negro to enroll at the all-white University of Mississippi (Ole Miss). Doar and McShane had accompanied Meredith in two earlier failed attempts to enroll. Mississippi Governor Ross Barnett blocked both previous attempts in defiance of an order of the Fifth Circuit Court of Appeals. This day's low clouds had kept Barnett in the capitol, leaving it to Lieutenant Governor Paul Johnson to prevent Meredith from reaching the registrar's office.

Doar, McShane and Meredith walked from the steps of the Cessna to a waiting green sedan. Escorted by several state highway patrol cars, the three men headed for the Ole Miss campus. A block and a half from their destination, the convoy was stopped by about twenty state troopers and a nearly equal number of sheriffs from surrounding counties. Lieutenant Governor Johnson moved forward from the ranks of the troopers as the three men in the green sedan got out of the car. "I'm going to have to refuse Mr. Meredith,"[39] Johnson told Doar. Doar, after introducing himself as "an officer of the court,"[40] reminded Johnson of the federal court order prohibiting state officials from interfering with Meredith's enrollment. When Doar tried to hand Johnson a copy of a contempt citation, Johnson said, "I would not accept the papers."[41] Meredith, wearing a gray suit, white shirt, and a red tie, looked on silently. Federal Marshal McShane vainly tried to push his way through the troopers. "We are going to block you and if there is any violence it will be on your part,"[42] Johnson said sternly. Doar replied, "You people understand you are in violation of a court order."[43] Doar then began calling off names from the metal tags on the troopers' shirts while the Marshal wrote them down on a pad. Finally, after another unsuccessful attempt to muscle past the troopers, Doar, McShane and Meredith returned to their car. As they drove off, they could hear the troopers and sheriffs loudly applauding their defiant state leader.

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[36] Interview with John Doar, *supra* note 8.

[37] CAGIN & DRAY, *supra* note 7, at 342.

[38] *See* Anthony Lewis, *Quick Action Due: Officials Say Force is Only Way to Uphold Law in State*, N.Y. TIMES, Sept. 26, 1962, at 1; Claude Sitton, *U.S. Defied Third Time*, N.Y. TIMES, Sept. 27, 1962, at 1; BRANCH, *supra* note 17, at 647-72.

Four days later, Doar and Meredith again circled the Oxford airport. Doar looked down from the Cessna to see a field lined with Army trucks, jeeps, buses, planes, in addition to tents, giant searchlights and assorted riot equipment. Meanwhile, the sightings of dozens of federal marshals with their white helmets and yellow armbands had swept the northern Mississippi campus town into a frenzied state. Crowds waving Confederate flags and chanting anti-administration slogans gathered near the university's administration building. Drivers honked horns as recordings of "Dixie" blared on their car radios. Doar dropped Meredith off at deserted Baxter Hall, leaving him with marshals under orders to shoot anyone who attempted to break into his second-floor room. He then left to meet with university officials to work out the details of a face-saving plan, secretly arranging with the Governor to register Meredith the next morning after a theatrical display of federal force. (Robert Kennedy and Governor Barnett had haggled over such issues as how many federal marshals must draw arms.) Events, however, quickly spun out of control.

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[39] Claude Sitton, *U.S. Defied Third Time*, N.Y. TIMES, Sep. 27, at 1, 28.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

Rioting broke out that night. As students drifted away from the confrontation, more violent diehard segregationists drifted in. Rocks and bottles turned to bullets. Protestors attacked marshals with bulldozers, fire trucks and automobiles. Casualties mounted. Robert Kennedy, on the phone with an obviously distressed Doar, consoled him, saying he knew Ole Miss was "a long way from Wisconsin."[44] His brother, the President, commented, "I haven't had such an interesting time since the Bay of Pigs."[45] Around midnight, the Kennedys made the decision to send in the United States Army. The battle continued to rage all night. When it was finally over, 160 marshals had been wounded—twenty-eight by bullets—and two people, including a British reporter, were dead.

In the wee hours of the morning Doar returned to Baxter Hall to share a dormitory room with James Meredith. Early the next morning, they drove to the registrar's office in a bullet-riddled border patrol car. With John Doar standing by his side, Meredith enrolled at Ole Miss. At 9:00 A.M., he attended his first class, Colonial American history. For the next few weeks, to ensure Meredith's protection, Doar and University of Mississippi's first black student lived together.

Reflecting later on the episode, Doar agreed that the government should have come in earlier with more military power: "Would the Justice Department of the United States ever have done it that way again? No, they wouldn't have."[46]

Four days after Schwerner, Goodman and Chaney were reported missing, an unnamed FBI source was quoted in the

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[44] BRANCH, *supra* note 17, at 667.

[45] BRANCH, *supra* note 17, at 667.

[46] Interview with John Doar, *supra* note 8.

New York Times as saying, "We're now looking for bodies."[47] Only Mississippi politicians seemed to be in self-delusion about the three men's fate. Governor Paul Johnson, who the day before had promised Dulles cooperation in the search, joked about the mystery that gripped the nation. Standing next to the Governor of Alabama, Johnson responded to a reporter's question about progress with the quip and a smile, "Governor Wallace and I are the only two people who know where they are—and we're not telling."[48]

Day four brought three bus loads of sailors wearing blue bell-bottom trousers and old shoes and boots to Bogue Chitto, the site of discovery of the burned car. Using walking sticks to fend off water moccasins, rattlesnakes and copperheads, the sailors slowly beat their way through the swamp and countryside, looking for bodies or evidence. Nothing was found.

As the intense search for bodies continued, investigators found several corpses of civil rights workers in lonely Mississippi places—but not any of the three everyone was looking for. They pulled the corpse of a black boy of about fourteen out of the Big Black River. The boy, found wearing a CORE T-shirt, was never identified.

It finally became apparent that the bodies, if they were ever to be discovered, would be found not by a search but by an investigation. John Doar was later to tell a jury of twelve Mississippians that "rarely in the history of law and enforcement" was it "so difficult to obtain evidence"[49] of a crime as it was to determine what took place in the four hours beginning at 9 P.M. on June 21, 1964 in and around Philadelphia. Doar said "a thousand eyes explored every corner of Neshoba County" but "Neshoba County remained silent."[50] He added that only "extraordinary methods" and

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[47] Claude Sitton, *Hope for 3 Wanes as Dulles Opens Mississippi Talks*, N.Y. TIMES, June 25, 1964, at 1. Bob Moses agreed, telling volunteers in Ohio, "The kids are dead." BRANCH, *supra* note 5, at 374.

[48] CAGIN & DRAY, *supra* note 7, at 357.

[49] United States v. Price, Crim. No. 5291, at 2328 (S.D. Miss. Oct. 11-21, 1967) [hereinafter *Transcript*].

[50] *Id.* at 2327-28.

"the maximum effort of the FBI" could bring the conspirators "to the bar of justice of law."[51]

The FBI recognized that solving the case would require infiltration of the White Knights of the Ku Klux Klan of Mississippi, an organization protected both by its own insularity and the fear that it inspired in the community. Before it was over, the Bureau's "Mississippi burning," or MIBURN, investigation would include interviews with nearly one thousand Mississippians. About half of the interview subjects were known or suspected members of the Klan. The final report was over 150,000 pages long. FBI Major Case Inspector Joseph Sullivan summarized the problem: "They owned the place. In spirit, everyone belonged to the Klan."[52] Sullivan said the usual Bureau approach of convincing people that cooperation was in their own best interest did not work. "It didn't pay to push Neshobans, because they weren't afraid."[53] Locals delighted in sending agents off on wild goose chases or debating agents on issues such as communist influence in the civil rights movement. Sullivan bemoaned the countless hours spent "wheel-spinning" and engaging in "jolly talks with Klansmen."[54]

On August 4, the forty-fourth day of the investigation, a Caterpillar bulldozer began excavating an earthen dam site on a property southwest of Philadelphia known as the Old Jolly Farm. FBI agents had spread the word a week before that a substantial reward would go to anyone who told the Bureau where the bodies were buried. For the sum of thirty thousand dollars and a guarantee of absolute confidentiality, an unknown Neshoba citizen, acting through an intermediary, provided the information nearly one hundred agents had spent weeks trying to uncover. Shortly before 3:00 P.M., agents began noticing "the pungent odor of decaying flesh."[55] Blowflies swarmed in the 106-degree heat near the Cat's ten-foot blade and buzzards began circling in the sky above the dam. Minutes later, the heels of a pair of men's boots poked out of the newly exposed clay. That evening the Department of Justice announced that half of the mystery was solved: the bodies of the three civil rights workers had at last been found.

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[51] *Id.* at 2378.

[52] CAGIN & DRAY, *supra* note 7, at 373.

[53] CAGIN & DRAY, *supra* note 7, at 373.

[54] CAGIN & DRAY, *supra* note 7, at 374.

[55] CAGIN & DRAY, *supra* note 7, at 398.

Klan conspirators, once so smug, began to worry.

As dozens of FBI agents continued their investigation through the late summer and fall, John Doar followed agency reports from Mississippi closely, but spent much of his time doing what he had done since he ended ten years of work in a family practice in New Richmond, Wisconsin, to join the Justice Department at the close of the Eisenhower Administration. He litigated voter rights cases in the Deep South. It was, according to Doar, "a job nobody else wanted."[56]

The job offer had come, sight unseen, when Doar was in California working on a paternity suit. Doar slept on the offer a night and then called Harold Tyler, chief of the Civil Rights Division to say, "I'll do it."[57] Doar recalled, "I liked trial work, and I knew this was tough trial work. Also, I had some clear ideas about civil rights in this country."[58]

Doar arrived in Washington in July 1960 at age thirty-nine. In addition to ten years of litigation experience at the family law firm, his resume included an undergraduate degree from Princeton (where he was captain of the basketball team), a law degree from Boalt Hall in Berkeley, and Air Force service during World War II. Six-foot-three, 185 pounds, with dark, curly hair, he was described as "boyish"[59] looking. A 1963 *New York Times* profile of Doar reports that "[o]bservers sometimes liken his manner to that of Gary Cooper, or his voice to that of James Stewart. They then add immediately that his total lack of self-consciousness and his aversion to publicity make comparisons with any actor misleading."[60]

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[56] Nadine Cohodas, *Remembering the Voting Rights Revolution*, N.J. L.J., Aug. 14, 1995, at 9.

[57] BRANCH, *supra* note 17, at 332.

[58] Roy Reed, *Ubiquitous Rights Aide*, N.Y. TIMES, Sept. 3, 1963, at 26.

[59] *Prosecutor for Rights*, N.Y. TIMES, Dec. 4, 1965, at 35.

Whatever may be said of his style, everyone considered the reserved, laconic Doar a man of substance. "'John Doar had a clear vision of what was unjust and intolerable, and he kept focused on that,' [said] prominent civil rights lawyer William L. Taylor.'"[61] Within months of his arrival at the Justice Department, Doar became impatient with standard bureaucratic responses to problems. Until Doar showed up, Justice Department lawyers used what were called "coaching" or "box" memos to obtain from FBI agents the facts necessary to develop voting rights cases.[62] Sometimes 200 pages in length, these memos dictated to agents the specific questions and follow-up questions they were to ask frustrated black voter applicants. Doar realized that it would be much more efficient to poke around himself. He did. His first trip took him to rural western Tennessee, where black sharecroppers had complained that farmers evicted them when they tried to register. The Justice Department needed to determine whether the complaints were justified and how many blacks were affected. Doar's first night in Tennessee was something of an epiphany. He walked into the dim light of a rural clapboard church filled with Negro sharecroppers. Doar nervously announced to the crowd that he was there to help. How many people, he asked, had received eviction notices. To his great surprise, virtually every hand went up.

Doar learned that building a strong case required being his own investigator. "I was the first Justice Department lawyer who went down South to see what the facts were for himself,"[63] he said. Sometimes he traveled incognito so as not to alert local whites to the presence of an official from the hated Department of Justice. Doar, wearing khaki pants, work shirts, and old boots, trekked across cornfields and knocked on doors in search of rejected black voters. "I spent a great deal of each year on the road,"[64] he said in his plainspoken, understated way. In fact, Doar's frenetic pace of travelling was legendary. "John Doar's in Birmingham," one reporter announced at dinner. "No, he's in New Orleans," another reporter said. "No," chimed in a third, "I saw him here in Jackson." "You're all right," said a fourth reporter. "He was in Birmingham this morning, argued a case in New Orleans this afternoon and arrived in Jackson tonight."[65]

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[60] Reed, *supra* note 58, at 26.

[61] Cohodas, *supra* note 56, at 9.

[62] BRANCH, *supra* note 17, at 333-34.

[63] Cohodas, *supra* note 56, at 9.

[64] Cohodas, *supra* note 56, at 9.

His busy public life had its personal costs. The fourth child of Doar and his wife, Anne, went unnamed for six weeks in 1963 as Doar crisscrossed the South taking care of civil rights emergencies. While he was away, Justice Department employees wrote various names on slips of paper and put them in a hat. When he finally returned to Washington, the name Doar drew was Burke, for Burke Marshall, then his boss. The child was named John Burke. "It was hard on my wife," Doar later recalled. "It may have impacted my children some."[66]

Although recognized early on as a very talented lawyer, Doar never stopped trying to become an even better one. In one of the first of nearly thirty voting rights suits brought by Doar, a judge reprimanded him for not backing up his arguments with enough hard evidence. Doar took the judge's criticism to heart. From then on, southern judges learned to expect mountains of supporting evidence from Doar and other Justice Department lawyers. "'He goes in with evidence by the bale now,'" a court reporter said. "'I'll bet that judge is sorry he opened his mouth.'"[67]

Doar was a great respecter of truth. One of his former assistants at the Justice Department and now Touro Law School Dean, Howard Glickstein, remembered discussing strategy in a voting rights case with Doar. There were two ways of presenting the case to the court, Glickstein recalled. One way was to straightforwardly present the facts. The other way was to blur the facts in a way that somewhat strengthened the government's position. When Glickstein suggested to Doar that they adopt the second approach, Doar sat up straight in his chair. "Absolutely not!" he said. "You just present the facts as they are. We represent the United States of America. We don't blur."[68] Draft briefs sent to his desk by younger lawyers were frequently returned with the demand for more "facts, fact, facts."[69] Doar once sent to every lawyer in his division a copy of a Rolls Royce advertisement. The ad said that the ticking of the dashboard clock was the only noise that could be heard inside the automobile. This, Doar pointed out, was much better than saying that the car was quiet.[70]

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[65] Reed, *supra* note 58, at 26.

[66] Interview with John Doar, *supra* note 8.

[67] Reed, *supra* note 58, at 26.

Doar was so sincere and so well prepared that judges "took anything that came out of his mouth as the Gospel truth."[71] His careful, thorough approach and soft-spoken arguments bordered on being dull, but "with all the emotionally charged rhetoric of the time, being dull could be very effective."[72]

There was one night in McComb, Mississippi, when Doar had second thoughts about his decision to become the Justice Department's southern troubleshooter. A voter registration rally at the McComb governmental center ended with nearly all participants rounded up and sent to jail. The only movement figure to escape arrest was Charles Jones, who had stayed away in order to preserve a communications link. Jones called Robert Kennedy, who suggested that he call John Doar. Jones reached Doar at his suburban Washington home and told him the facts as he understood them. Everyone he knew was in jail. He had no bond money or support. Rumors were floating that the Klan would take Bob Moses, the groups's leader and later director of the Mississippi Summer Project, out of jail and kill him. "Help," Jones pleaded. "Okay, I'm coming right in," Doar answered.[73]

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[68] Telephone Interview with Howard A. Glickstein, Dean, Touro Law School (Sept. 25, 1999).

[69] *Prosecutor for Rights*, *supra* note 59, at 35.

[70] Telephone Interview with Howard A. Glickstein, *supra* note 68.

[71] Telephone Interview with Howard A. Glickstein, *supra* note 68.

[72] Telephone Interview with Howard A. Glickstein, *supra* note 68.

[73] FREED POWLEDGE, FREE AT LAST? THE CIVIL RIGHTS MOVEMENT AND THE

While he waited for Doar, Charles Jones hid in a black-owned butcher shop. The next day, when the police came in looking for him, Jones was in a butcher's coat chopping meat. "I didn't know what I was doing," Jones later recalled. "I must've messed up twenty dollars' worth of meat, whacking on that board with this knife."[74] But the ruse worked. The officers left after being told by Jones that he had not seen the man they were hoping to arrest. "That night," Jones recounted, "I heard this knock on the door. I opened the door, and John Doar said, whispering, 'Hurry, hurry, close the door.' . . . He said, whispering again, 'Close the door. Those people are serious! I'm afraid they're going to kill me. They've been snooping around my motel room.'"[75] Jones had expected the authority of the federal government to come swooping in with a cape to save him. The contrast with reality could hardly have been greater. "This was the might of the United States of America, the greatest country in the history of the world, quote-unquote, telling me to close the door and keep the light down and talk quiet."[76]

On the gray, drizzling morning of December 4, 1964, federal agents swept through east-central Mississippi arresting nineteen alleged conspirators in the murders of Mickey Schwerner, Andrew Goodman and James Chaney. All of the men were identified as Ku Klux Klansmen. One of the men charged was Cecil Price, the deputy sheriff who arrested the three civil rights workers in the afternoon, then freed them later that night. Also arrested was Sheriff Lawrence Rainey. The men were not charged with murder, a state crime, but rather with violation of a Reconstruction Era federal law that prohibited "conspiring to violate the civil rights" of citizens "under color of state law."[77]

PEOPLE WHO MADE IT 331 (1991).

[74] *Id.* at 332.

[75] *Id.*

[76] *Id.*

[77] Fred P. Graham, *Legal Poser on Rights*, N.Y. TIMES, Feb. 26, 1965, at 14.

Six days later, United States Commissioner for the Southern District of Mississippi Esther Carter dismissed the charges against all nineteen men, declaring that the confession on which the arrests were based was hearsay evidence. *Life* magazine published a photo taken at the hearing before Judge Carter that reinforced every northern civil rights supporter's stereotype of southern law enforcement. The photo showed a smiling Sheriff Rainey leaning back in his chair, booted foot and exposed hairy calf on knee, with a huge chew of tobacco in his cheek and holding a popcorn-bag sized package of Red Man tobacco in his hand.[78] After the hearing, the smiling and the laughing continued as defendants and their lawyers congratulated themselves. Inside the courtroom, the mother of James Chaney wept quietly. Outside, an unidentified woman rested on her knees on the sidewalk wailing, "Jesus, Jesus, no."[79]

John Doar and other Justice Department attorneys a month later convinced a federal grand jury in Jackson to issue indictments against the conspirators. But again Doar would be disappointed. On February 24, 1965, Federal Judge William Harold Cox, as ardent a segregationist as could be found on the federal bench, threw out the indictments against all conspirators other than Rainey and Price. Cox ruled, in a very narrow interpretation of the federal civil rights statute, that the other seventeen were not acting "under color of state law." "The right of every person not to be deprived of his life or liberty without due process," Cox wrote, "merely guarantees" against "interference by *the states*."[80] Doar began to prepare the government's appeal of Cox's decision.[81]

The defendants were charged with violating the Civil Rights Act of 1870, 18 U.S.C. § 241, 242 (1966).

[78] David Nevin, *Strange, Tight Little Town, Loathe to Admit Complicity*, LIFE, Dec. 18, 1964.

[79] CAGIN & DRAY, *supra* note 7, at 437.

[80] Graham, *supra* note 77, at 14.

[81] With Doar on the brief for the United States submitted to the Supreme Court were Louis F. Claiborne and Gerald P. Choppin. Solicitor General Burke Marshall argued the case for the United States before the Court on November 9, 1965.

One month after Judge Cox tossed out the indictments he had secured against the Neshoba County conspirators, the ubiquitous John Doar tramped gamely in a downpour along Route 80 in rural Lowndes County, Alabama. Soaked to the skin, his black hair hanging across his forehead, Doar passed the midpoint of his fifty-four mile journey from Selma to Montgomery. The new Assistant Attorney General for Civil Rights considered it his duty to superintend 300 Alabama Freedom marchers. The risk of violence was great, Doar knew. He hoped that the presence of hundreds of National Guard troops would discourage would-be attackers.[82]

Doar and the troops were on hand because of what had happened in two abortive marches earlier in the month. On March 6, "Bloody Sunday," police and mounted deputies beat marchers led by Dr. Martin Luther King as they attempted to cross the Edmund Pettus Bridge over the Alabama River. After a second unsuccessful attempt to cross the same bridge three days later, white toughs in downtown Selma bludgeoned to death one of the marchers, a white Unitarian minister from Boston named James Reeb.

The mostly young and mostly black marchers sang freedom songs as they walked, their spirits undampened by the elements. Many wore plastic bags converted into ponchos. Some children sported hats made of cereal boxes. The Reverend Martin Luther King limped along with the group, favoring his blistered left foot. Organizers of the march hoped it would focus attention on Alabama's unwillingness to extend basic civil rights to blacks. They planned to present a petition demanding equal treatment to Governor George C. Wallace in Montgomery.

Twenty-one miles from their destination, Doar and the other wet and weary marchers made camp in a pasture-turned-quagmire. The group listened to songs and speeches from over two dozen entertainers supporting their cause, then retired early to four large tents pitched on the muddy property.

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[82] Roy Reed, *Alabama March Passes Midpoint*, N.Y. TIMES, Mar. 24, 1965, at 1; Interview with John Doar, *supra* note 8.

Two days later on March 25, at 11:30 P.M., John Doar was eating his first meal of the day at the Elite Café in downtown Montgomery. Things had gone well, he thought. Thousands of marchers and supporters had participated in the final rally at the Capitol. More importantly, the march had been completed without violence. Then Doar was summoned to the telephone. He returned to his table minutes later with a worried look on his face. "It was the FBI," Doar told his dinner companion. "A Mrs. Liuzzo has been killed on the road back to Selma."[83]

Mrs. Viola Liuzzo, a Detroit housewife and white freedom marcher, had been travelling with a black man on Route 80 in rural Lowndes County—the same stretch of road the marchers had walked just two days before. She was shot and killed by one of four men riding in a passing car. One of the other three riders was Gary Rowe, a FBI informant and Klan infiltrator. Rowe identified the three Klansmen riding in the car, including the shooter, twenty-two-year old Collie Leroy Wilkins, Jr. Rowe said the killing was carried out under orders from a Klan superior known only as "Robert."

Wilkins was tried twice on murder charges in Alabama state courts. A trial in May ended in a hung jury. An October trial ended in an acquittal. In his successful defense of Wilkins, attorney Matt Murphy described Mrs. Liuzzo as "a white nigger" who "turned her car over to a black nigger" so that he might haul "niggers and Communists back and forth."[84] Murphy attacked the prosecution's star witness Gary Rowe as a man "who would accept money from the Communists, money from the NAACP, money from the Martin Luther King outfit."[85] He asked the jury: "Could you believe him on oath when you know he's a liar and a perjurer, holdin' himself out to be a white man and worse than a white nigger?"[86]

Following the failed state prosecutions, John Doar prosecuted Wilkins and his two fellow Klansmen on federal charges in Montgomery. Doar had to convince the all-white jury that the three men violated an 1870 Reconstruction law that made it illegal to conspire to "injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."[87] Doar contended that the Klansmen's action fell under the law because the march from Selma to Montgomery had been sanctioned by a federal court order. It was considered a "difficult"[88] argument, but Doar had the right judge, Frank M. Johnson, a courageous southern judge who handed down numerous decisions applauded by civil rights advocates. He conducted the trial with his usual stern decorum. After two days of deliberations, the jury came in with its verdicts: "guilty" for all three defendants. Judge Johnson handed down the maximum sentence allowed under federal law: ten years imprisonment.

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[83] *Prosecutor for Rights*, *supra* note 59, at 35.

[84] DON WHITEHEAD, ATTACK ON TERROR: THE FBI AGAINST THE KU KLUX KLAN IN MISSISSIPPI 307-308 (1970).

[85] *Id.* at 308.

[86] *Id.*

The first successful federal civil rights prosecution in Alabama history came in Doar's first criminal prosecution. President Lyndon Johnson, recuperating from gall bladder surgery on his Texas ranch, congratulated Doar on the "successful conclusion"[89] of the conspiracy trial. Doar was obviously moved by the jury's verdict. He said that he was proud to be an American and proud to be a lawyer. He expressed the hope that the verdict would send a message to racist terrorists. "The court and the jury did their duty. I'm very proud of the system of justice in this country."[90] The jury's decision came on Doar's forty-fourth birthday. He said he would celebrate by planning a strategy to cope with the appeal.

Two years later John Doar prepared to conduct his second—and last—prosecution. He sifted through voluminous

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[87] Roy Reed, *U.S. Opens Conspiracy Case Against Three Klansmen*, N.Y. TIMES, Nov. 30, 1965, at 33. The Klansmen were charged with violating 18 U.S.C. § 241, a Reconstruction Era statute enacted in 1870.

[88] *Id.*

[89] Robert B. Semple, Jr., *Jury in Alabama Convicts Klansmen in Liuzzo Case*, N.Y. TIMES, Dec. 4, 1965, at 1.

[90] *Id.* at 35.

FBI files, talked with potential witnesses, and traveled extensively throughout Neshoba County. Doar recalled, "I knew the area just like I know St. Croix County"[91]—the county of his youth in northwestern Wisconsin.

Martin Luther King twice visited Philadelphia, the "strange, tight little town"[92] with a "nearly pathological"[93] hatred of ideas from outside Mississippi.

During King's first visit, a month after the civil rights workers disappeared, he addressed a crowd of blacks. He spoke about the case that was on everyone's mind. "Three young men came here to set you free," he told the crowd. "Things are going to get better," he promised. "Walk together, children. Don't get weary."[94] Four carloads of FBI agents protected King as he spoke in 1964.

Two years later, King returned to Philadelphia to mark the second anniversary of the civil rights workers' deaths. By this time, King's outspoken opposition to the Vietnam War had caused him to fall out of favor with the Johnson Administration, and federal protection for his visit was almost non-existent. King led a procession of 300 from a local church to the jail on Myrtle Street, where he stopped to pray at the site where Schwerner, Chaney and Goodman had been incarcerated. As the group bowed their heads, mobs of armed white men closed off both ends of the narrow street. One young man turned a hose on the group. Battling their way on to the courthouse, King and other marchers fended off hoes, broomsticks and ax handles. A large man dressed in a cowboy hat, sunglasses and a short-sleeved uniform met King at the two-story red-brick courthouse. It was Deputy Cecil Price. Price said, "You can't come up these steps."[95] "Oh, yes," King replied. "You're the one who had Schwerner and the other fellows in jail."[96] "Yes, sir," Price answered. King tried to address the crowd above the loud jeers of white onlookers. "In this county, Andrew Goodman, James Chaney, and Michael Schwerner were brutally murdered. I believe the murderers are somewhere around me at this moment."[97] "You're damn right—they're right behind you,"[98] muttered the Deputy. King bravely continued, "I want them to know that we are not afraid. If they kill three of us they will have to kill us all."[99]

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[91] Interview with John Doar, *supra* note 8.

[92] CAGIN & DRAY, *supra* note 7, at 380.

[93] CAGIN & DRAY, *supra* note 7, at 381.

[94] CAGIN & DRAY, *supra* note 7, at 381.

[95] CAGIN & DRAY, *supra* note 7, at 382.

King described that afternoon in Philadelphia as one of the most frightening in his life. "This is a terrible town, the worst I've seen. There is a complete reign of terror here."[100]

Doar later agreed with King's characterization. "Neshoba County was a rough, tough, mean, insular place—a bootlegging rural outpost. It was awful."[101]

William Harold Cox and John Michael Doar had met numerous times in the judge's courtroom. It would be fair to describe them as being old adversaries. A 1963 letter from Cox to Doar, written in response to Doar's request to give the voting rights case of *United States v. Mississippi*[102] immediate attention, is revealing of their relationship:

> Dear Mr. Doar,
>
> I have a copy of your letter of October 12 . . . [I] thought I had made it clear to you . . . that I was not in the least impressed with *your impudence* in reciting the chronology of the case before me with which I am completely familiar. If you need to build such transcripts for your boss man, you had better do that by interoffice memoranda because I am not favorably impressed with you or your tactics in undertaking

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[96] CAGIN & DRAY, *supra* note 7, at 382.

[97] CAGIN & DRAY, *supra* note 7, at 382.

[98] CAGIN & DRAY, *supra* note 7, at 382.

[99] CAGIN & DRAY, *supra* note 7, at 382.

[100] CAGIN & DRAY, *supra* note 7, at 382.

[101] Interview with John Doar, *supra* note 8.

[102] 229 F. Supp. 925 (S. D. Miss. 1964) (reversed by a unanimous Supreme Court, United States v. Mississippi, 380 U. S. 128 (1965).

> to push one of your cases before me. I spend most of my time in fooling with lousy cases brought before me by your department in the civil rights field, and I do not intend to turn my docket over to your department for your political advancement . . . . You are completely stupid if you do not fully realize that each of the judges in this court understands the importance of this case to all the litigants. I do not intend to be hurried or harassed by you or any of your underlings in this or any court where I sit and the sooner you get that through your head the better you will get along with me, if that is of any interest to you . . . .[103]

In a recent interview, Doar called Cox "a piece of machinery," and remembers that the judge "would really lambast me when I came into his court with a motion."[104] Doar once tried to have Cox censured by the Fifth Circuit for his lawless behavior on the bench.

Cox owed his position on the federal bench to his friend and Ole Miss Law School roommate, James Eastland, chair of the Senate Judiciary Committee. Senator Eastland had the power to block President Kennedy's appointment of NAACP counsel Thurgood Marshall to the United States Court of Appeals for the Second Circuit—an appointment Kennedy very much wanted to make. Eastland bargained for his old friend, saying to Robert Kennedy, "Tell your brother that if he will give me Harold Cox I will give him the nigger."[105]

Robert Kennedy and Burke Marshall met with Cox prior to his nomination. Cox assured the Attorney General and the head of the Civil Rights division that he would enforce federal law as it had been interpreted by the Supreme Court. Satisfied with Cox's assurance, President Kennedy nominated Cox for the federal district bench. As soon as his robe was on, however, Cox became a major obstacle to the Justice Department. In one voting rights suit brought by Doar, for example, Cox refused to let government lawyers inspect the public voting records of

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[103] John Doar, *The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Acts of 1957 and 1960*, 25 FLA. ST. U. L. REV. 1, 10 (1997).

[104] Interview with John Doar, *supra* note 8.

[105] CAGIN & DRAY, *supra* note 7, at 308.

Clarke County. The Fifth Circuit Court of Appeals overruled that and many of Cox's other decisions, but his manipulations caused considerable delay in the progress of civil rights in Mississippi.

Eventually, however, the volume of suits brought by Doar and other Justice Department attorneys began to limit Cox's room to throw up major roadblocks. "We smothered them with paper," Doar later recalled. "We were really putting the bite on Judge Cox."[106]

John Doar saw Cox make the most serious mistake of his judicial career. "It was a Saturday morning in 1964," Doar recalled. "I was in his chambers on an application for a temporary injunction. I said to Judge Cox, 'there's nothing un-American about blacks wanting to vote.'"[107] Cox responded to Doar's mild contention by describing Negro voter applicants as "a bunch of chimpanzees."[108] Cox's offensive statement appeared the next day in a story in the New York Times. The resulting controversy nearly cost Cox his job. Senator Jacob Javits of New York and Congressman Peter Rodino of New Jersey led an impeachment effort. The attempt failed, but received substantial support.

Was Cox somewhat humbled by the experience? The question was very much on the minds of attorneys as they prepared for the upcoming case of *United States v. Price*. The United States Supreme Court had reached its decision in the appeal of Judge Cox's decision dismissing the indictments. The Court ruled unanimously that the indictments be reinstated against all defendants.[109]

Trial proceedings began on Monday, October 9, 1967, in the white stone federal building in Meridian. Across the street from the courthouse, in front of Bill Gordon's barber shop, Raymond Roberts, the brother of one of the defendants, placed a large Confederate flag, bringing cheers from onlookers. Barricades set up by Meridian police to keep cameramen off the grounds surrounded the federal building. Two federal marshals stood on the courthouse steps to further discourage anyone who might think of climbing over the barricades. Inside the building, a crowd of jurors, witnesses and reporters gathered outside the second-floor courtroom. As the 350 members of the jury venire waited for the nine o'clock start of the proceedings, they nervously shifted their weight from foot to foot and talked in low tones. The men almost all wore suits and ties, the women their best dresses.

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[106] CAGIN & DRAY, *supra* note 7, at 325.

[107] Interview with John Doar, *supra* note 8.

[108] VOLLERS, *supra* note 22, at 84.

[109] United States v. Price, Crim. Action No. 5291, heard in Federal District Court for the Southern District of Mississippi in Meridian, Oct. 11-21, 1967. Justice Fortas announced the opinion for a unanimous Court on March 28, 1966, reversing the district court's dismissal of the indictments. United States v. Price, 383 U.S. 787 (1966).

Inside the courthouse, Judge Cox imposed a strict discipline. No cameras were permitted anywhere in the building and reporters were allowed to enter and leave the courtroom only during recesses. Fifteen attorneys were assembled at the tables in front of the judge. John Doar led a team of three prosecution lawyers, including Justice Department colleague Robert Owen and the United States District Attorney for Mississippi, Robert Hauberg. A dozen lawyers represented the defendants, including the entire Neshoba County bar.

In what Doar called the "first big turning point"[110] in the trial, Judge Cox had granted a prosecution motion to have the jury drawn from the entire Southern Mississippi District rather than from just the six counties around Neshoba County, as the defense had requested. Doar said, "We would never have had a chance with a jury from those counties around Neshoba."[111] With surprising speed, an all-white jury of seven women and five men was selected from the over 200 prospective jurors summoned. "We were looking for signs of intelligence," Doar recalled. "I had my guys look at everybody's homes—we were looking for homes that were well kept up."[112] Seventeen Negroes had been among those on the panel from which the final jury was drawn; challenges from defense lawyers excluded every one of the seventeen.

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[110] Interview with John Doar, supra note 8.

[111] Interview with John Doar, supra note 8.

[112] Interview with John Doar, supra note 8.

On Tuesday, John Doar delivered a brief opening statement. He told the jury that the defendants plotted murder "because they didn't like what these boys stood for."[113] Knowing that feelings against the federal government ran strong in east-central Mississippi, he felt that he had to explain the need for a federal civil rights prosecution. The defense had been saying the case belonged in state court. It was, the defense said, a murder case, not a civil rights case.

> *I hope very much that you will understand the reason I have come here, its [sic] not because of any skilled experience that I am here, but only because I hold the office as head of the division with the Department of Justice, and it is my responsibility to try and enforce the law in which these defendants have been charged.*
>
> *The United States Government felt it was essential that one of its Washington officials be here to speak directly and frankly to you about the reason for the extraordinary effort the Federal Government undertook to solve this crime, and to state to you twelve Jurors why the Federal Government has assumed the role of prosecutor of this conspiracy involving murder . . . . I am here because your National Government is concerned about your local law enforcement and in a conviction local law must work if we deserve our liberty and freedom . . . .*
>
> *When local law enforcement officials become involved as participants in violent crime and use their position, power and authority to accomplish this there is very little hope to be hoped for, except with assistance from the Federal Government, but Members of the Jury, exactly what does that mean? It means that the Federal Government is not invading Philadelphia or Neshoba County, Mississippi, it means only that these defendants are tried for a crime under Federal law in a Mississippi city, before a Mississippi Federal Judge, in a Mississippi courtroom . . . before twelve men and women from the State of Mississippi. The sole responsibility of the determina-*

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[113] Walter Rugaber, *All-White Jury Picked as Trial of 18 in Slaying of 3 Rights Workers Begins in Mississippi*, N.Y. TIMES, Oct. 10, 1967, at 21.

> *tion of guilt or innocence of these men remain in the hands where it should remain, the hands of twelve citizens from the State of Mississippi.*[114]

One of the twelve defense attorneys used his opening argument to tell the jury that the government's lead lawyer was the same spokesman for the despised Justice Department who "forced the Negro James Meredith into the University of Mississippi."[115] Doar nodded in confirmation.

On the first day of testimony John Doar put on the stand the Reverend Charles Johnson as a background witness to describe Mickey Schwerner's activities in Mississippi. Doar asked Johnson where Schwerner lived, what he did, what he wore, and whether he had a beard. Johnson testified that Schwerner wore "a goat beard,"[116] prompting Judge Cox to interrupt and ask, "What kind of beard?"[117] Johnson repeated the answer he had given to Doar. On cross-examination, defense attorney Laurel Weir bombarded Johnson with a series of questions designed to make Schwerner look bad to jurors. "Did he advocate the burning of draft cards? Was he an atheist? Did he encourage the boycotting of stores? Was he a member of the NAACP?" Then Weir crossed the line. "Now let me ask you if you and Mr. Schwerner didn't advocate and try to get young male Negroes to sign statements agreeing to rape a white woman a week during the hot summer of 1964?"[118] Cox's lips trembled. He told Weir the question was "highly improper" unless the defense had "a good basis" for it.[119] He demanded to know what that basis might be. "A note was passed to me by someone," answered Weir. Cox persisted, "Well, who is the author of that question?" A pause. Herman Alford, one of the other defense attorneys, broke the embarrassing silence at the defense table. "Brother Killen wrote the question, one of the defendants." Edgar Ray Killen raised his hand. Cox looked sternly at the crowded defense table. "I'm not going to allow a farce be made of this trial and everybody might as well get that through their heads, including everyone of these defendants, right now."[120]

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[114] *Transcript*, *supra* note 49, at 2323-24.

[115] Interview with John Doar, *supra* note 8. (Nov. 6, 1999).

[116] *Transcript*, *supra* note 49, at 97.

[117] *Transcript*, *supra* note 49, at 97.

[118] *Transcript*, *supra* note 49, at 100-13.

[119] *Transcript*, *supra* note 49, at 114.

"The rape question was a tremendous blunder," Doar said later. "It was the second big turning point. If there had been any feeling in the courtroom that the defendants were invulnerable to conviction in Mississippi, the incident dispelled it completely. Cox made it clear he was taking the trial seriously. That made the jurors stop and think: 'If Judge Cox is taking this stand, we'd better meet our responsibility as well."[121]

The defense strategy of relying on their old ally Judge Cox to bail them out of trouble was beginning to look misguided.

John Doar and his prosecution team began to provide an answer to the question that had baffled so many investigators for so long: What happened in Neshoba County in the hours between the release of the three civil rights workers from jail about 10:30 P.M. and 12:45 A.M., when an engulfing fire stopped a watch in their CORE station wagon?

> *Members of the Jury, this is no extraordinary case, it has no precedent anywhere. Members of the Jury, this was a calculated, cold-blooded plot. Three men, hardly more than boys, were the victims. The plot was executed with a degree of self-possession and steadiness equal to the wickedness to which it was planned. The participants believed themselves safe, safe because the crime was committed in Neshoba County, and Neshoba law was involved. Members of the Jury, the defendants were mistaken. Such a secret could be safe nowhere, there is no nook nor corner on this earth where the secret of this plot would remain safe.*[122]

The prosecution's case was built, witness by witness. Ernest Kirkland, a black Longdale resident, described seeing the three men off on the Sunday afternoon of their disappearance after they had stopped to discuss the recent firebombing with Kirkland and other members of the Mount Zion congregation. He recalled their dress: Chaney in a white T-shirt and jeans, Goodman in a khaki shirt and jeans, and Schwerner in a blue shirt with khaki trousers and a ballcap. State Patrolman, E. R. Poe, testified that Cecil Price radioed from his location on Highway 16 east of Philadelphia about 3:00, "I've got a good one!"[123] Fifteen minutes later Poe pulled his white patrol car to a stop at the intersection of Beacon and Main Streets in Philadelphia, where Deputy Price was parked behind three men, two white and one black, who were changing the tire on a blue station wagon. County jailer, Minnie Herring, testified that Cecil Price showed up at the jail shortly before 10:30 P.M.—six-and-a-half hours after booking them for speeding and "investigation"—telling her, "Chaney wants to pay off—we'll let him pay off and release them all." Herring told jurors that after the three were let out of their cells and their billfolds were returned, Price told them, "See how quick you can all get out of Neshoba County."[124] Dr. William Featherstone, the doctor who performed the autopsies, described the bullet wounds. Bullets went through the hearts of the two white bodies, he said. The Negro was shot in the head. Travis Buckley, one of the defense lawyers, asked Featherstone, "You don't know for certain these deaths were not caused by poisoning, do you doctor?" Featherstone replied, "They might have been bit by a rattlesnake." Laurel Weir, another defense lawyer asked, "You don't know if those bullet holes were put there before or after death?" Featherstone answered, "All I can say is I found them there."[125]

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[120] *Transcript*, *supra* note 49, at 115.

[121] CAGIN & DRAY, *supra* note 7, at 446-47.

[122] *Transcript*, *supra* note 49, at 2326-27 (summation of John Doar).

> *This is a case, in part, of circumstantial evidence. Midnight murder in the rural areas of Neshoba County provide few witnesses . . . . Mrs. Herring was the last known person to see them alive. She saw them as they walked from jail. Five bullets are found in their bodies. The boys are alive at 10:30*

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[123] *Transcript*, *supra* note 49, at 2345.

[124] *Transcript*, *supra* note 49, at 193.

[125] Terry Keeter, MERIDIAN STAR, Oct. 11, 1967. at 1.

> *when they are released, the station wagon is on fire at 12:45 fourteen miles northeast of Philadelphia . . . . Cecil Ray Price controlled the time of release. He could have released them an hour later, he could have released them an hour early, but he released them just so they would go to their deaths.*[126]

> *Members of the Jury, Neshoba County chose to remain silent as to what was known about the events that night in that county. Much has and will be said about the extraordinary methods in discovering the guilty. Should it have been otherwise? Was this a State to be forgotten? Was this not a case for maximum effort of the F.B.I.? Could the Federal Government have succeeded in any other way other than rewards, payment for information, tending to expose the band of murderous conspirators, the midnight killers, to bring them to the Bar of Justice of Law?*[127]

Three Klan members were Doar's key witnesses. Wallace Miller, Delmar Dennis, and James Jordan became three of the most hated men in Neshoba County.

> *Faced with this wall of silence, the FBI encouraged Wallace Miller to step forward to furnish what he had heard from his friends within the Klan, and to appeal to Delmar Dennis to penetrate the hierarchy of the plan and to reveal their secrets, believing that this would lead to fixing the responsibility on all of those who planned this crime. All of you probably have an initial resentment against paid informers, but before you finally decide examine these men, Miller and Dennis. They are native sons of Mississippi, they are men of courage, because whom among us would doubt their lives are constantly in danger?*[128]

Heavyset, jowly, balding, forty-three-year-old Wallace Miller was an officer in the Meridian Police Department. In April 1964, Klan recruiter Edgar Ray Killen administered in Miller's living room the secret oath that made him a member of the

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[126] *Transcript, supra* note 49, at 2331 (summation of John Doar).

[127] *Transcript, supra* note 49, at 2328 (summation of John Doar).

[128] *Transcript, supra* note 49, at 2328-29 (summation of John Doar).

KKK. In response to Doar's questions, Miller described a Klan meeting in which Killen announced that the "elimination" of "Goatee" had "been approved" by Imperial Wizard Sam Bowers. The night of his testimony, Miller received threatening phone calls. Patrol cars were assigned to keep a close check on his home. Miller told reporters, "It's hard to have to sit there and point your fingers at relatives and people you've known a long time. It's hard."[129]

> *To understand this case, you must understand the White Knights of the Ku Klux Klan. In seeking members, the White Knights are reported to be a political organization, a non-violent, peaceful group, but once the members were inducted, once the oath was administered, the members soon learned from Edgar Ray Killen that this was an organization of action. This was no Boy Scout group, it was here to do business.*[130]

Delmar Dennis was a handsome twenty-four-year-old Baptist and Methodist minister when he joined the Meridian Klan chapter as its kludd, or chaplain. Dennis, dressed in a conservative business suit and tie, calmly told the jury about a meeting attended by about seventy-five Klan members at an abandoned school gymnasium on the night of June 16, 1964. He testified that one of the members interrupted the proceedings to announce that there seemed to be "an important meeting" taking place at the Mount Zion Church. Armed volunteers set out for Longdale, returning about an hour later to report that they had beaten a group of Negroes, but saw no sign of the despised "Goatee." "It was agreed we had better leave the building," Dennis testified, "so the meeting broke up."[131]

> *Dennis, who had left the Klan, was asked to re-enter and to penetrate the heart of the secret organization, and that he did. Members of the Jury, the payment for information that*

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[129] Jack Nelson, *Witness Identifies Nine Suspects in Civil Rights Deaths*, L.A. TIMES, Oct. 13, 1967, at 1.

[130] *Transcript*, *supra* note 49, at 2339 (summation of John Doar).

[131] *Transcript*, *supra* note 49, at 2344; Terry Keeton, *Minister-Turned Informer Offers His Story in Court*, MERIDIAN STAR, Oct. 12, 1967, at 1; WILLIAM H. MCILHANEY II, KLANDESTINE 85-86 (1975).

> *these informers received for the risk they took, for the time they consumed, for the expenses they incurred for the inevitable isolation when their role came out is pretty meager. Their payment was made for value received. These men are not criminals, they played no part in this or any other conspiracy, and for the FBI there was no other way to proceed. So, I come here now to ask only that you do justice.*[132]

Dennis told the jury that he had met with Imperial Wizard Sam Bowers after the killings. Bowers said that he was "pleased" with the operation. Bowers told Dennis, "It was the first time that Christians had planned and carried out the execution of a Jew."[133] Dennis said that Bowers appeared unconcerned about the upcoming trial: "He said Judge Cox would probably make them take [the three bodies] and put them back under the dam—that it was an illegal search."[134]

> *This was a small, secret militant group, masterminded by a fanatic, who had singled out Schwerner as a man who had to be eliminated—not to preserve or protect Mississippi, but rather to satisfy his own consuming hate.*[135]

On cross-examination, defense lawyer Laurel Weir attempted to portray Dennis, who had received $5,000 a year for three years from the FBI for his cooperation in the case, as a Judas: "Instead of thirty pieces of silver, you got $15,000."[136] Weir's comment brought a stern rebuke from Judge Cox.

The most incriminating testimony came from James Jordan. The FBI knew from Wallace Miller that Jordan was a Klansman. They also learned of comments that Jordan had made to two nuns suggesting that he might have been involved in the murders. Jordan found it hard to keep secrets. John Proctor, the FBI's Meridian-based agent, sensed that Jordan was someone he could break down. "You either get on the right side or you can go to jail,"[137] Proctor told him. Scaring Jordan by revealing his secret Klan number, twelve, Proctor finally convinced Jordan to talk.

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[132] *Transcript*, *supra* note 49, at 2330 (summation of John Doar).

[133] Keeton, *supra* note 131, at 1.

[134] Keeton, *supra* note 131, at 1.

[135] *Transcript*, *supra* note 49, at 2338 (summation of John Doar).

[136] KEETON, *supra* note 131, at 1.

> *With the aid of this information the FBI persuaded Jordan to stop running, to give information and return from sanctuary which required the expenditure of Three Thousand Dollars, and partial support for Jordan since that day.*[138]

James Jordan was scheduled to testify for the prosecution on October 11. He was flown into Meridian from his relocated home in Georgia and placed under heavy guard in the office of John Proctor. Proctor returned from lunch that day to find the government's star witness sprawled out on his desk, lying on his back with his shirt off. Suspecting a heart attack, Proctor frantically began pumping Jordan's chest. FBI men rushed Jordan to the hospital where his severe chest pains were diagnosed as the result of hyperventilation, not a heart attack. Later that afternoon Jordan was ushered through the back door of the courthouse by six guards with drawn guns. At the courthouse, he collapsed again and was carried from the building on a stretcher. The next day he was back at the courthouse. At 3:30 P.M., John Doar stood and said the two words the packed courtroom had been waiting to hear: "James Jordan."[139] The courtroom stirred in anticipation as marshals went out to fetch Jordan. Every eye turned to the door. Some in the crowd leaned forward for a better look. In walked Jordan, a bald, square-faced blocky man. He looked straight ahead as he walked forward to the witness stand. Looking pale and exhausted as he testified with his hands clasped in front of him, he never made eye contact with the defendants.

> *Members of the Jury, in the execution of a conspiracy, there are members of the conspiracy who play different parts. There are master planners, there are the organizers, there are the lookout men, there are the killers, there are cleanup and*

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[137] CAGIN & DRAY, *supra* note 7, at 432.

[138] *Transcript*, *supra* note 49, at 2329 (summation of John Doar).

[139] Walter Rugaber, *Witness Tells of Role in Slating of Rights Workers*, N.Y. TIMES, Oct. 13, 1967, at 43.

> *disposal people, and there are the protectors. Each of these defendants played one or more part in this conspiracy. Now, we'll take the testimony of Jim Jordan who told you exactly what happened between eight o'clock and one o'clock that morning.*[140]

Jordan, in a flat, quiet voice, told the jury about a Klan meeting around 6:00 P.M. on June 21 at the Longhorn Drive-In in Meridian. Preacher Killen came in and "said he had a job he needed some help with over in Neshoba County. He said that two or three of those civil rights workers were locked up and they needed their rear ends tore up." Jordan said that Killen told him he "needed about six or seven men." Responding to Killen's request, Jordan began rounding up men. A dozen eager young men showed up to meet with Edgar Ray Killen at Akin's Mobile Homes in Meridian in the early evening. Killen told the men to get gloves and to be at the courthouse in Philadelphia by 8:15 P.M. Two carloads of Klan members met Killen in Philadelphia. He took them on a drive-by tour of the jail where the civil rights workers were being held, then to a spot "near an old warehouse right at the edge of town" where they were to lie in wait for their prey. Killen left to see his uncle, who was lying in repose at a local funeral home.[141]

Jordan continued his story. He testified that around 10:30 a city police car drove up to the parked cars. "They're going on Highway 19 toward Meridian," the officer told Jordan and the others. "Follow them." Jordan's car set off down the highway, following a red Chevrolet with other armed men in it. The red car broke down and Jordan's car stopped beside it. One of the Klan members in the red car told Jordan's group to "go ahead" and that the civil rights workers' car "would be stopped anyway by the Deputy Sheriff." Jordan's car again raced off down the highway until they got sight of Price's patrol car, red light blinking, pulling a station wagon over to the side of a cut-off road. "[Price] got out and told the three men in the car to get out. They got in the back of his car.[142] A three-car caravan, including the CORE wagon with a Klan member at the wheel, made its way back to a deserted clay road. Rock Cut Road, it was called.

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[140] *Transcript*, *supra* note 49, at 2345-46 (summation of John Doar).

[141] *Transcript*, *supra* note 49, at 957.

Jordan told the jury and the filled courtroom that he was serving as a lookout on a rise above the road when he heard "about four"[143] shots. He said that he did not see the shootings—just the three bodies lying along side the road when he returned a few minutes later. As Jordan testified, a black female spectator in the courtroom began to sob uncontrollably. She was led out into the hallway.

> *Much will be said about Jordan's part in the participation of the crime or murder in this case. It is not important for you to decide who actually fired the gun, or which gun killed the three boys.*[144]

For an eyewitness account of the actual killings, Doar turned to a confession. "Horace Doyle Barnette," Doar told the jury, "felt an irresistible impulse of conscience to be true to himself."[145] Barnette made his confession to two FBI agents during a six-hour interrogation in a motel room in Louisiana in November 1964. But he had since repudiated it and stood trial with the other defendants.

> *Always beside [the young men of the Klan who might have reservations about what they were doing] were other men deep into the swamp, men of violence and fury, men who were going to kill anyone who broke away. The most violent of all was Wayne Roberts.*[146]

As John Doar read Barnette's confession to the jury, Barnette, nearly bald with glasses, stared impassively ahead. Since Judge Cox ruled that the confession could not be used as evidence against any of the defendants but Barnette himself, the name of Wayne Roberts in the confession was read as

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[142] *Transcript*, *supra* note 49, at 968-73.

[143] *Transcript*, *supra* note 49, at 988.

[144] *Transcript*, *supra* note 49, at 2349-50 (summation of John Doar).

[145] *Transcript*, *supra* note 49, at 2329-30.

[146] *Transcript*, *supra* note 49, at 2356 (summation of John Doar).

"Blank."[147] Roberts was a beefy, twenty-six-year-old, dishonorably discharged ex-Marine. At the time of the murders, Roberts sold mobile homes in Meridian.

"Blank," Doar intoned, "pulled Schwerner out of the car, spun him around so that Schwerner was standing on the left side of the road, with his back to the ditch, and said, 'Are you the nigger lover?' and Schwerner said, 'Sir, I know just how you feel.' Blank had a pistol in his right hand, then shot Schwerner. Blank then went back to the car and got Goodman, took him to the left side of the road with Goodman facing the road, and shot Goodman."

"At this time," Doar continued reading, "Jim Jordan said 'save one for me.' I do not remember how many times Jordan shot. Jordan then said, 'You didn't leave me anything but a nigger, but at least I killed me a nigger.'"[148]

The defense case consisted mainly of a parade of dozens of character and alibi witnesses, almost all of them friends or relatives of the defendants. During one day of testimony, they took the stand at a rate of one every seven minutes. M. L. Graham praised Bowers as a person of strong religious convictions: "Sam is in church everytime the doors are open. I believe Sam has had an experience with the Lord."[149] Finis McAdory remembered that he had met with Deputy Price at 10:30 on the night of the murders to talk about a runaway niece. Friends of Edgar Ray Killen said they saw him on evening of June 21 paying his respects to a departed uncle at the funeral home. Wayland McMullen remembered that he and his wife planned to go dancing with the Roberts, but they couldn't get a sitter and had to cancel. Other wives, friends and relatives testified about ailing backs and quiet nights at home.

Other defense witnesses challenged the veracity of the prosecution's informers. Joyce Dennis, the estranged wife of Delmar Dennis, told the jury that her husband's testimony did not "deserve full faith and credit."[150] Beverly Rawlings recalled a conversation with James Jordan in September 1964 in which he confessed to shooting James Chaney. "I'm looking for the FBI to pick me up most anytime," she remembered him saying. "I'd just as soon kill another Negro as not," he was said to have added ominously. The defense witness list also included two African-Americans. Annie Coleman, a Laurel, Mississippi resident since 1910, testified that she had once worked in a theater owned by Sam Bowers "selling tickets, and making popcorn and doing other things." She said that she did not know him to be involved in Klan activities. He was "a very nice person." She said she thought Bowers was now working as a distributor of "those machines you play records in." After testifying, Coleman complained to reporters that other blacks had "been calling me the worst names I ever heard." She said that "they think I'm some sort of bad person cause I came up here and told the truth."[151]

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[147] *Transcript*, *supra* note 49, at 2361.

[148] *Transcript*, *supra* note 49, at 2361.

[149] Walter Rugaber, *Mississippi Civil Rights Slaying is Expected to Go to Jury Today*, N.Y. TIMES, Oct. 18, 1967, at 25.

The defense rested its case. Jurors had heard 160 witnesses presented by the two sides.

On Wednesday morning, October 18, 1964, John Doar delivered his summation in his flat, soft-spoken voice. A reporter for the Meridian Star wrote that the local people in the audience sat in "rapt attention" as it listened to "Doar's crisp, unfamiliar accents."[152] Blacks in the audience occasionally dropped their heads into their hands as Doar painted his graphic picture of the deaths on Rock Cut Road. It is not Doar's style to be theatrical. His most demonstrative moment came when he pointed directly at Cecil Price and charged that the Deputy had used "the machinery of his office, the badge, the car, the jail, the gun"[153] to facilitate the murderous conspiracy.

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[150] *Id.*

[151] *Id.*

[152] Terry Keeton, MERIDIAN STAR, Oct. 18, 1967, at 1.

[153] Walter Rugaber, *Trial of 18 Charged with Conspiracy in Mississippi Goes to All-White Jury*, N.Y. TIMES, Oct. 19, 1967, at 37.

> *Members of the Jury, this is an important case. It is important to the government. It's important to the defendants, but most important, it's important to the State of Mississippi. What I say, what the other lawyers say here today, what the Court says about the law will soon be forgotten, but what you twelve people do here today will long be remembered.*
>
> *These defendants will stand before you on the record in this case and they will beg of you for indulgence. In effect they will say as Gloucester said as he stood over the body of his slain king, "Say I slew him not." The queen replied,"Then say they were not slain." But they are dead. If you find that these men are not guilty of this conspiracy it would be as true to say that there was no nighttime release from jail by Cecil Price, there were no White Knights, there are no young men dead, there was no murder. If you find that these men are not guilty, you will declare the law of Neshoba County to be the law of the State of Mississippi.*[154]

Mississippi law gave defense lawyers the last word. Mike Watkins told the jury that although defense witnesses might have been friends and relatives of his clients, "at least they're not paid informers." He suggested that "if life in Mississippi is miserable for the agitators who come here, it's because they made it that way." W. D. Moore complained that "the government brought in its crack leader-organizer John Doar . . . and then they opened up the coffers of the United States for money." Moore speculated that the prosecution was instigated by LBJ, Vice President Humphrey, and Senator Robert Kennedy. Herman Alford, in his closing, made the improbable claim that the defendants were "as innocent and pure as the driven snow."[155]

At 4:24 P.M., on October 18, the case of *United States v. Price* went to the jury. After deliberating for three hours, the jury was escorted to the Lamar Hotel in downtown Meridian, where they spent the night.

Most courtroom observers thought a guilty verdict was impossible. William Bradford Huie, a native of the South covering the trial for the *New York Herald Tribune*, wrote: "Those are little people. Some of them are quite poor. Some of them live out on the edges of small communities, far back in the piney woods. How can they afford to take the risks?"[156]

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[154] *Transcript*, *supra* note 49, at 2363-64 (summation of John Doar).

[155] Rugaber, *supra* note 154; Oct. 19, 1967, at 37; Terry Keeton, MERIDIAN STAR, Oct. 19, 1967, at 1.

As the jury deliberated for a second day, most of the eighteen defendants stood or sat on benches in the hallway outside the second-floor courtroom. They tried to look confident. They talked. They waited. Cecil Price leafed through a copy of *Gun Sport Magazine*. Sheriff Lawrence Rainey talked with friends, telling them, "Even if they turn me loose, they'll have done what they set out to do—break me." Two questions were heard over and over: "When do you think the jury will come back?" and "What do you think they will do?"[157] A few yards away, the jury continued its deliberations.

The jury filed into the courtroom shortly after 3 P.M. to report that they were at an impasse. Judge Cox proceeded to read the so-called "Allen charge," a set of directions upheld by the Supreme Court in the 1898 case of *Allen v. United States*.[158] Also known as "the dynamite charge" for its success in blowing open deadlocked juries, the Allen charge was opposed by attorneys for the defendants who would count a hung jury a victory. Cox reminded the jury that trials are expensive, that a second jury is unlikely to be any more capable of reaching a verdict, and that—although no juror should surrender his "honest conviction"—jurors should "deliberate" with others and not hesitate to change opinions. In the hallway following the judge's reading of the charge, a court officer overheard Wayne Roberts joking to Cecil Price, "Judge Cox just gave that jury a 'dynamite charge.' We've got some dynamite for them ourselves."[159] The court officer reported the remark to a not very amused Judge Cox.

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[156] HUIE, *supra* note 12, at 159.

[157] Walter Rugaber, *Deadlocked Jury is Ordered to Continue Deliberations in Mississippi Slayings of 3 Rights Workers*, N.Y. TIMES, Oct. 20, 1967, at 31.

[158] 164 U. S. 492 (1896).

[159] Rugaber, *supra* note 157, at 31.

The next morning the jury returned its verdict. The jury foreman, Langdon Anderson, a fifty-two-year-old oil exploration operator, handed the sealed verdict to Judge Cox. Cox glanced at the papers, then passed them to his courtroom clerk who read the decision. "We, the jury, find the defendant Cecil Ray Price not guilty. I'm sorry, your honor, may I start over?" Cox nodded. The clerk began again: "We, the jury, find the defendant Cecil Ray Price guilty of the charges contained in the indictment."[160] The defendants appeared to stiffen as they heard the first verdict. The list continued. Seven defendants were found guilty, including triggerman Wayne Roberts and Klan leader Sam Bowers. Eight other defendants, including Sheriff Rainey, were acquitted. The jury reached no verdict on Edgar Ray Killen and two other defendants.

"To have that jury return that verdict was a great thing," Doar recalled. "The jury paid attention; they were serious people." It appeared to be a compromise verdict, but Doar is not so sure: "What is more likely is that they were applying the beyond-a-reasonable-doubt standard very strictly." Looking back more than thirty years later, Doar believes that "the trial helped Mississippi get beyond the caste system. Up to that time, no white person in the state had ever been convicted for violence against a black. After the trial, the good people of Mississippi became more confident that they could move away from their past."[161]

Not all conspirators are equal in the eyes of a prosecutor; some may be guiltier than others. Doar believed Edgar Ray Killen "was really central to the conspiracy."[162] The jury may have divided on Killen's guilt, Doar believes, because much of the evidence against him was more circumstantial than was the case against those defendants the jury convicted. Returning home to Philadelphia after the trial, Killen greeted one of his neighbors: "Man, I thought they were fittin' me for overalls over there."[163]

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[160] Walter Rugaber, *Mississippi Jury Convicts 7 of 18 in Rights*, N.Y. TIMES, Oct. 20, 1967, at 1.

[161] Interview with John Doar, *supra* note 8.

[162] Interview with Joan Doar, *supra* note 8.

Judge Cox sentenced Wayne Roberts and Samuel Bowers to ten years each. The other convicted defendants received either five or three-year sentences. Cox later said, "They killed one nigger, one Jew, and a white man. I gave them all what I thought they deserved."[164]

Forty days after the Mississippi jury returned its verdict, John Doar announced his retirement from the Justice Department. "I just felt it was the right time," he said at the time. "I've been here for seven years. I worked principally in the South and we got a good start on many of the things on which I've worked."[165]

Doar's departure from the Justice Department caused dismay in the civil rights community. Civil rights leader Joseph Rauh said, "This is a terrible loss at a time when we can't afford any losses." A former leader of the Student Nonviolent Coordinating Committee agreed, calling Doar "one guy in the establishment they could get to." John Lewis, one of the civil right's movement's most courageous figures—and later Congressman John Lewis—said of Doar's years at Justice: "His job was great, his will and talent even greater."[166]

Columnist Jimmy Breslin wrote of Doar: "His life has been in those nothing motels on the highways or in the dirty-windowed hotels of small cities. It has been spent with people afraid to help him or with people who think about shooting him, in courtrooms where you can't win and with politicians who will not listen."[167] He did sometimes win, of course—as in

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[163] Terry Keeton, MERIDIAN STAR, Oct. 21, 1967, at 1.

[164] CAGIN & DRAY, *supra* note 7, at 452.

[165] Ronald Maiorana, *Doar to Be Executive Director of Drive to Aid Brooklyn Slum*, N.Y. TIMES, Dec. 3, 1967, at 36.

[166] Roy Reed, *Doar Resigns as Chief of the U.S. Civil Rights Division; Integration Leaders Term Action 'Gigantic Loss'*, N.Y. TIMES, Nov. 30, 1967, at 35; Office of Congressman John Lewis, Congressman John Lewis Keynotes Ceremony Commemorating 40th Anniversary of the Civil Rights Division of Justice (Dec. 8, 1967)

[167] Jimmy Breslin, John Doar: Doar Prize (Nov. 28, 2000), *available at* http://goprincetontigers.fansonly.ocsn.com/genrel/080100.aaj.html (last visited Jan. 6,

Meridian in 1967. And politicians did listen—eventually. Whether in the form of landmark voting rights legislation or in the growing number of people willing to do what is right, the marks of John Doar on the South were undeniable as he ended his tenure at the Justice Department.

Upon leaving Justice, Doar and his family moved to New York, where he had accepted Robert Kennedy's invitation to be the executive director of a corporation set up to redevelop the Bedford-Stuyvesant, an African-American and Puerto Rican neighborhood of Brooklyn. He later left the corporation and returned to private practice, but Doar's years of public service were not over.

On a Friday afternoon in early January of 1974, Hillary Rodham was called into the plain office of John Doar, chief counsel for the House Judiciary Committee's investigation of the Watergate Affair. Doar's straight-arrow ethics and Republican credentials had made him a consensus choice for the job. Stony-faced and terse, Doar looked across his desk at the twenty-six-year-old woman, fresh out of law school. They had first met the previous year. "Burke Marshall asked me to judge a moot court up at Yale," Doar recalls. "Hillary and Bill, then Yale students, were there to meet me when I got off the train in New Haven. They took me out to lunch and, after the moot court arguments were over, they put me back on the train. That's how she got her job."[168] Prepare a memo on the constitutional grounds for impeaching the President, Doar ordered, and have it on my desk by Tuesday.

Doar told his team of forty mostly young lawyers that they must forget ideology and focus on facts. Keep your mouths shut, he demanded, as no leaks would be tolerated. And be respectful. Nixon must be referred to at all times as "the President." Doar's penchant for secrecy caused one member of the Judiciary Committee, Bill Hungate of Missouri, to grumble, "We're so damn secretive that we're going to impeach Nixon in

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2003).

[168] Interview with John Doar, supra note 8.

secret and he'll never know it."[169]

Throughout all the tumult and rhetoric of Watergate, the reserved Doar kept his characteristic low profile. He turned down Ethel Kennedy's invitation to swim at her pool. Too political, he said. Unlike virtually all other players in the Watergate, Doar never appeared on television. He never wrote a book.

Most observers credit Doar's careful presentation of the evidence for convincing undecided Republican members of the Committee to support the resolution of impeachment. His fair and even-handed manner received bipartisan praise.

It is in his work in the South, not Watergate, that Doar takes his greatest pride. In his law office in New York City is a large framed map of the southern United States covered with pins representing the many voting rights challenges instituted by Doar. "My time as a lawyer is almost over," Doar wrote in a 1997 article in the Florida State Law Review, but "the roll call of those Civil Rights Division lawyers still rings in my head."[170]

In 1994 Doar returned to his old school in the Twin Cities, St. Paul Academy, to address a group of seventh graders and be honored at a distinguished alumni banquet. For forty-five minutes, Doar answered the questions of the junior high students about civil rights and his personal life. He talked about his father, one of the most respected lawyers in northwest Wisconsin. He talked about his mother Mae, a former schoolteacher with a strong interest in reading and in the arts. He told the students of a conversation he had several years earlier with his mother. He asked her what she was most proud of. He half-expected, he said, to hear how proud she was of her lawyer-sons. Instead, "She drew herself up to full height and said, 'That's easy: Being able to hold a job and play the piano.'" The class seemed to miss the humor and turned the discussion back to civil rights. A boy in the class asked Doar, "Did you ever agree that white people are better than black people?" "No, do you?" Doar asked. The boy quickly said "No." Doar nodded.[171]

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[169] Evan Thomas, *Bill and Hillary's Long, Hot Summer*, NEWSWEEK, Oct. 19, 1993, at 36.

[170] Doar, *supra* note 103, at 16.

As he approached eighty, Doar's once black and curly hair had turned straight and silver. His large frame had begun to bend. I interviewed Doar in late 1999. He spent most of that fall in a large windowless room, in a sprawling building owned by the Ingersoll Machine Milling Company of Rockford, Illinois. Court records and other documents spread out before him on a large table. He said he expected his work defending the company to occupy him another year. Then he planned to retire to split time between his farm in upstate New York and an oceanfront property in Sonoma County, California.

"As a lawyer, no one could have a more fortunate career than I've had. It's been all luck and being at the right places at the right time." Thinking back on his career, Doar's thoughts seem to turn instantly to others—to people such as Burke Marshall ("the best there is—somebody who comes along once every 600 years") and Robert Kennedy ("I have the greatest respect for what he did"). He saw himself not as a visionary, but as a competent workhorse. "If someone says 'this is what the drill is,' I'll get it done."[172]

He spoke almost reverently of "the spirit of Justice" in the sixties. It was, he said, a spirit governed by a "philosophy grounded in hope." Doar and his colleagues persevered "because it made sense," not because they thought their work would succeed. Failures and frustrations led to better approaches. "We learned," Doar said, "you just got to keep going back. We couldn't change Mississippi from a desk in Washington."[173] The Department's eventual success, Doar believed, was due in no small measure to its being seen by white southerners as independent from the campaigns of SNCC, Martin Luther King and other social reformers. "We didn't want white people to be able to say 'the Civil Rights Division and SNCC are hitched together at the hip like Siamese twins. We kept our distance." Doar suggested that the caste system broke because each group "did what they did best—each moved through the South like an independent campaign."[174]

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[171] Washington, *supra* note 13, at 1B.

[172] Washington, *supra* note 13, at 1B.

[173] Interview with John Doar, *supra* note 8.

Doar did not consider what he did heroic: "I don't think it's quite the right word. We just knew viscerally that we were doing something that was awfully important. We weren't trying to be heroes. At the same time, all of us realized that when our lives were almost over we wanted to be able to look back and say, 'we did our best: we worked as hard and as long as we could."[175]

In a 1977 *New York Times Magazine* interview, Cecil Price revealed that he had recently watched and enjoyed the television mini-series, "Roots." His views on integration had changed, he said. "We've got to accept this is the way things are going to be and that's it."[176]

Meridian resident John Proctor, on whom Gene Hackman's portrayal of a no-nonsense Mississippi-based FBI agent in the 1989 movie Mississippi Burning[177] was loosely based, said both he and most of the convicted defendants just want to put the whole terrible episode behind them. "Why don't they leave all that alone?" Proctor responded when asked by Diane McWhorter in 1989 about the controversial movie. The movie is going to "be about as popular around here as a turd in a punchbowl," he predicted. Proctor said he still occasionally bumped into Cecil Price and others that he helped to convict. He said that if Wayne Roberts, the killer of the three rights workers ran into him, "he'd come over and shake my hand."[178]

The decades, and the federal voting rights acts, have changed Mississippi politics. In 1964, Mississippi officials from the governor on down opposed—and, in many cases, attempted to thwart—the Mississippi Burning investigation. Now some officials say they want to prosecute the midnight killers of

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[174] Interview with John Doar, *supra* note 8.

[175] Interview with John Doar, *supra* note 8.

[176] CAGIN & DRAY, *supra* note 7, at 456.

[177] MISSISSIPPI BURNING, Metro Goldwyn Mayer (1988).

[178] Diane McWhorter, *Since Mississippi Burned*, PEOPLE, Jan. 9, 1989, at 36.

Schwerner, Chaney and Goodman. Mississippi Attorney General Mike More and Neshoba County District Attorney Ken Turner began in 1999 trying to build a state case against some of those responsible for the horrific murders on Rock Cut Road thirty-five years earlier. If not for Cecil Price's untimely death in 2001, it is likely that prosecutions would have begun.[179]

Martin Luther King, Jr. said many times, "The moral arc of the universe is long, but bends toward justice."[180] If King's prophecy is correct—and, at least with respect for the civil rights of black Americans, it seems to be—it is not the result of some Darwinian propensity, but rather because of the hard work of citizens of courage and principle such as John Michael Doar.

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[179] Emily Wagster (Associated Press), *Attention Turns to Civil Rights' Era's Last Major Unresolved Case*, ATHENS-BANNER HERALD, May 27, 2002, *available at* http://www.onlineathens.com/stories/052702/new_20020527017.shtml. State murder trials would likely have begun by 2002 were it not for the untimely death, due to injuries sustained in a workplace fall, on May 6, 2001, of Cecil Price. Price had begun cooperating with prosecutors, but had not yet furnished a sworn statement.

[180] CAGIN & DRAY, *supra* note 7, at 292.

MILITARY JUSTICE FOR FOREIGN TERRORISTS AND FOR AMERICAN SOLDIERS: COMPARISONS AND A MISSISSIPPI PRECEDENT

Judge Leslie Southwick[*]

President George W. Bush issued a controversial executive order on November 16, 2001. The order provided that some of those who have been captured by American forces in the war on terrorism could be tried before military tribunals.[1] There were those who alleged that fundamental standards of fairness were being ignored. Among those who protested were individuals who are usually perceived as strongly supportive of the military.[2]

The executive order would permit the trial of detainees who are not American citizens, who are accused of violating the laws of war, and who would not be entitled to prisoner of war status under accepted rules governing international conflicts.[3] Issues of presidential authority, the requirement or benefits of congressional collaboration, and the obligations under international law have led to much legal analysis.[4]

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[*] Leslie Southwick has served as a judge on the Mississippi Court of [Civilian] Appeals since January 1995. He is also a major in the Mississippi National Guard. Among Major Southwick's less demanding duty assignments is as clerk of the usually dormant Mississippi Court of Military Appeals. Grateful appreciation is expressed to Major Gregory Maggs, United States Army Reserves, who is also a professor at George Washington University School of Law, for his invaluable explanation of the procedural rules for the tribunals. Major/Professor Maggs was especially knowledgeable as he had assisted a group of Army lawyers who provided advice to the Department of Defense in promulgating the rules.

[1] Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831-57,836 (Nov. 16, 2001).

[2] *E.g.*, William Safire, Editorial, *Seizing Dictatorial Power*, N. Y. TIMES, Nov. 15, 2001, at A31; William Safire, Editorial, *Kangaroo Courts*, N. Y. TIMES, Nov. 26, 2001, at A17; Jess Bravin & Keith Johnson, *Military-Tribunal Plan for Terror Suspects Runs into Resistance from Allies, Congress*, WALL ST. J., Nov. 26, 2001, at A3 (describing opposition of Rep. Bob Barr (R-Ga.)). Other protesters might have been less surprising. *E.g.*, Molly McDonough, *Tribunals vs. Trials*, A.B.A. J. Jan. 2002, at 20 (noting that ACLU "decried the order").

[3] Military Order, *supra* note 1.

Several months later, on March 21, 2002, the Defense Department issued more detailed rules for the conducting of the tribunals.[5] The American Bar Association president, who had expressed considerable concern previously, was pleased that "many of the recommendations made by our House of Delegates" in response to the President's order had been incorporated into these rules.[6]

As this episode reveals, tempering the extremes of war with the influences of law is a challenge. For most of history, nations did not try. It proves a formidable task to make war and law meet at a location acceptable to the interests of either endeavor. One perspective on the criticisms of these proposed military tribunals is that the procedures that allegedly would violate requirements of wartime due process if applied to suspected *al Qaeda* non-American terrorists are similar to the routine procedures applicable to American soldiers who are accused of crimes. The two sets of procedural rules will be compared in this article.[7] To the extent there are large similarities, some may consider that to be a condemnation of traditional military justice and not a reason to endorse using the same rules for suspected terrorists. An analysis of the justifications for military criminal law and procedure will not be undertaken in this article. It is sufficient that "Congress and the courts have long recognized that the need for a disciplined and combat-ready armed force mandates a separate system of justice for the military."[8] The purpose of this article is only to indicate similarities between this system of justice for the American military and that proposed for possible alien terrorists.

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[4] *E.g.*, Symposium, *Law and the War on Terrorism: The Military Tribunal Order*, 25 HARV. J.L. & PUB. POL'Y 591-663 (2002); Curtis A. Bradley & Jack L. Goldsmith, *Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249, 249-50 (2002).

[5] *See* discussion *infra* notes 43-63 and accompanying text. For a thorough discussion of military tribunal procedures, see the National Institute of Military Justice's ANNOTATED GUIDE: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (LEXIS-NEXIS 2002).

[6] Margaret Graham Tebo, *Qualified Praise*, A.B.A. J., May 2002, at 59 (noting that concerns remained regarding the non-involvement of civilian courts, pretrial detention, and rules of evidence).

[7] For a discussion of the significant distinctions between the constitutional authority underlying courts-martial and military commissions, and the differences in their jurisdiction, see Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW. Mar. 2002, at 19-40.

Noted first and briefly is the historical context for the current controversies. The proper treatment of large numbers of enemy prisoners has been disputed from the time of the first war of the American republic. Over 5,000 British troops surrendered during the American victory at Saratoga in 1777. Unlike the accused terrorists of *al Qaeda,* these soldiers were not suspected of violations of the understandings of civilized norms for war. The surrender agreement provided for their return to England if they pledged never again to take up arms against Americans. However, returning the captives to England would release British troops engaged in other missions to come to America.[9] The captured British troops, held in fairly harsh conditions but no worse than those experienced by American troops at Valley Forge, dwindled in number as a result of death and escape as most remained in captivity throughout the Revolution. At one stage, Thomas Jefferson took up their cause by arguing that the delay in repatriation was "an infraction of our public honour;" conversely, George Washington favored waiting.[10]

Captured enemy combatants are inevitably difficult to retain and dangerous to release. The problems are even more acute in a potentially endless war against terrorism as opposed to a conventional war that has a prospect for a meaningful peace treaty ending hostilities. The current difficulties are magnified since those being detained are not just enemy soldiers but may also have committed grave criminal offenses against the detaining country.

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[8] Michael J. Nardotti, Jr, *Military Commissions*, ARMY LAW. Mar. 2002, at 2. (Maj. Gen. Nardotti (Ret.) concluded his military career as The Judge Advocate General of the Army).

[9] Burrus M. Carnahan, *Reason, Retaliation, and Rhetoric: Jefferson & the Quest for Humanity in War*, 139 MIL. L. REV. 83, 92-93 (1993).

[10] *Id.* at 93, 93 n.34 & 96. Not only Americans were reluctant. The British also saw harm by honoring the terms, since Parliament's ratification of the Saratoga surrender agreement would have tacitly recognized the existence of the rebel country. *Id.* at 93.

This article will provide a primer on American military justice. It will not be detailed enough to permit the reader to prosecute or defend soldiers (or terrorists), but it should be introduction sufficient to place the 2002 military tribunals controversy in a larger context. After an overview of the federal court-martial rules, a comparison will be made with the procedures established for the tribunals that would try suspected terrorists. Finally, the related rules applying to Mississippi National Guard soldiers will be discussed, with a specific and rather delicate example given of the use of the state rules.

Prussian military theorist Carl von Clausewitz wrote, and has since been quoted in military writings with numbing frequency (such as here), that "War is the continuation of politics by other means."[11] Therefore, it should not be surprising that governing war and those that wage it are continuations, with adjustments, of normal political structures such as courts. However, in writing about military justice an equally famous phrase should be noted: "Military justice is to justice what military music is to music." That was from the always insightful Henry "Groucho" Marx.[12]

Lawyers in the Army, Navy, Air Force and Marine Corps are designated "judge advocates."[13] To those for whom the *JAG* television series[14] is the principal knowledge of the

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[11] GORDON A. CRAIG & FELIX GILBERT, *Reflections on Strategy in the Present and Future*, *in* MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE 863 (Peter Paret ed., Princeton Univ. Press 1986).

[12] Salvador Maria Lozada , *The Successful Appeal from Ballots to Bullets: The Herculean Hardships of Judicializing Politics in Latin America*, 25 N.Y.U. J. INT'L L. & POL. 123, 128 (1992). Marx allegedly borrowed the phrase from French Premier Georges Clemenceau, but there is no proof that Clemenceau actually said it. *See* L.H. LaRue, *What is the Text in Constitutional Law: Does it Include Thoreau?*, 20 GA. L. REV. 1137, 1142 n.2 (1986).

[13] 10 U.S.C.S. § 801(13) (1999).

[14] *JAG* (NBC network series 1995-96, CBS 1997-present). Though not among the experiences of any JAG lawyers whom I have met, the television military lawyers have physically rescued a pilot shot down over Bosnia and searched through the Afghan desert for a terrorist who had a nuclear weapon. Out-

Judge Advocate General's Corps, the reality of usual JAG Corps business would seem pedestrian. Even so, on American military posts around the world, JAG's and the courts in which they practice provide criminal justice for soldiers at the installation. The highest ranking judge advocate of the Army, Navy and Air Force is called "The Judge Advocate General" for that service—"The" in military parlance being capitalized before the title of this and some other principal staff officers.[15] The shorthand reference for this officer at least in the Army is "TJAG" pronounced "tee-jag." The Marine Corps as a component of the Navy does not have a separate TJAG, but a Marine judge advocate is eligible to be appointed as the Navy's TJAG.[16] The Judge Advocates General have two-star rank.[17]

The Coast Guard is usually a component of the Department of Transportation and shifts to being within the Navy only during wartime or when directed by the President.[18] Its military lawyers are called "law specialists."[19] The Coast Guard equivalent of The Judge Advocate General is the Department of Transportation's General Counsel except when that service is part of the Navy.[20]

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troubleshooting NASA engineers, they also saved a shuttle mission from sabotage. When in the courtroom, these JAGs are as likely to fire an automatic weapon into the ceiling for demonstrative purposes as to make an objection; actually, doing either can lead to the other. *Id.*

[15] 10 U.S.C.S. § 801(1) (1999); War Department General Order No. 2, Jan. 31, 1924, referenced in THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 139 (1975).

[16] 10 U.S.C.S. § 5148(b) (1999). The headquarters of the Marine Corps "is in the executive part of the Department of Navy," and that headquarters includes the Marine Corps Commandant. 10 U.S.C.S. § 5041 (1999). Though not the equivalent of a TJAG, a one-star brigadier general is assigned as the Staff Judge Advocate to the Marine Commandant, making this the senior judge advocate billet in the Marine Corps. 10 U.S.C.S. § 5046(a) (1999).

[17] 10 U.S.C.S. §§ 3037(a), 5148(b), and 8037(a) (1999). The relevant rank is that of a Major General for the Army, Air Force, and Marines, and a Rear Admiral for the Navy.

[18] 14 U.S.C.S. §§ 3-4 (1999).

[19] 10 U.S.C.S. § 801(11) (1999).

[20] 10 U.S.C.S. § 801(1) (1999).

A dual system of criminal justice exists for soldiers, whether the soldiers have full or part-time military status. "Part-time" service can be with the United States Reserves or with a state's National Guard. Many traditional civilian crimes such as murder and rape are also crimes under the Uniform Code of Military Justice (UCMJ).[21] Other kinds of offenses, such as disobedience of superiors, being absent without leave, or contemptuous conduct to a commander, are strictly military offenses.[22] Therefore, for some offenses, an active duty soldier stationed in the United States may be subject to prosecution for a violation of the UCMJ and by a civilian prosecutor for the same offense under state law. Often agreements are entered into between active duty military posts and local prosecutors to predetermine standards for the exercise of discretion so that an accused is prosecuted in only one of the justice systems.[23] Overseas, other rules control between the host government's court system and the military's jurisdiction. The jurisdictional arrangements are usually set out in what are called "Status of Forces Agreements."[24]

A traditional reservist or national guardsman is also subject to dual jurisdiction but not as often. Only if an individual is in military status when an offense occurs will military justice rules apply.[25] That is because the UCMJ is for soldiers. Unless a Guardsman or Reservist is in the status of a soldier when the crime occurs, civilian prosecution is the only option. Military status primarily arises during week-end drills once a month or during two weeks annually of training during the summer. When in military status, soldiers are subject to the UCMJ or a state National Guard equivalent such as the Mississippi Code of Military Justice.[26]

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[21] 10 U.S.C.S. §§ 918 (murder), 920 (rape) (1985).

[22] 10 U.S.C.S. §§ 886 (AWOL), 888 (contempt) (1985) and 890 (disobeying superior).

[23] *See* RULES FOR COURTS-MATERIAL (R.C.M.) 201(d) (if act "is subject to trial by court-martial and by one or more civil tribunals, foreign or domestic, the determination which nation, state or agency will exercise jurisdiction is a matter for the nations, states, and agencies concerned, and is not a right of the suspect or accused.") The "Discussion" section that follows suggests agreements between the military and local authorities.

[24] "The procedures and standards for determining which nation will exercise jurisdiction are normally established by treaty." *See* INTERNATIONAL & OPERATION LAW DIVISION, OPERATIONAL LAW HANDBOOK 3-7 & 3-8 (1995) (discussing that SOFA's are entered to define an array of issues for American forces in foreign countries, including dividing criminal jurisdiction with the host nation).

[25] 10 U.S.C.S. § 802(a) (1998).

In the United States military, the prosecution of a criminal offense may be through a court-martial. For less serious offenses under the UCMJ, the suspect's commander may instead offer an alternative process called "nonjudicial punishment." This process must first be offered by the commander, may then be rejected by the soldier, and if utilized, is imposed after a quite summary proceeding. The result may be appealed to the next level commander only on the basis that the punishment is unjust or disproportionate to the offense.[27]

An entirely separate judicial system exists for these courts-martial. For soldiers in the United States Army on active duty, courts-martial are held at their military post. An accused may appeal, but it is to the Army Court of Criminal Appeals.[28] Similar courts are established by each military service's Judge Advocate General consisting of panels of not less than three military judges, who may be commissioned officers or civilians.[29] Separate appellate courts exist for the Air Force and the Coast Guard, and one called the Navy-Marine Corps Court of Criminal Appeals.[30] Further appeals can be taken to the five civilian judges on the United States Court of Appeals for the Armed Forces ("CAAF," pronounced as "calf.")[31] Since 1983, a writ of certiorari can be sought from the United States Supreme Court after judgment at the CAAF, but only in certain categories of cases.[32] Before that time, there was no direct appeal to the Supreme Court.

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[26] MISS. CODE ANN. §§ 33-13-1 through 33-13-627 (Rev. 1998). When a Guardsman would be subject to state as opposed to federal jurisdiction is beyond the scope of this article. Briefly, a member of a state's Guard is only subject to state military law except during the period when he or she has been ordered into the active military service of the United States. When the latter occurs, that soldier is under federal jurisdiction, including that of the UCMJ. Perpich v. Dep't of Def., 496 U.S. 334, 345-46 (1990).

[27] 10 U.S.C.S. § 815 (1999).

[28] 10 U.S.C.S. § 866 (Supp. 2001).

[29] *Id.*

[30] The statute provides that each "Judge Advocate General" is to establish a Court of Criminal Appeals. 10 U.S.C.S. § 866(a) (1999). That quoted term is defined as "the Judge Advocates General of the Army, Navy, and Air Force and . . . the General Counsel of the Department of Transportation," who serves in that role for the Coast Guard. 10 U.S.C.S. § 801(1) (1999).

The procedures followed for a court-martial prosecution can be succinctly described. There are three forms of courts-martial—general, special and summary—which are listed here in descending order of the seriousness of the punishment that can be imposed and the degree of procedural complexity.[33] Only certain officers can convene a general court-martial, which is the equivalent of bringing charges against the soldier. For example, the commanding officers of the largest military units—brigades, divisions, and larger units—have such authority.[34] Lower ranking officers can convene the less rigorous and less severely punitive special and summary courts-martial.[35] A military judge presides over all but the lowest-level "summary" court-martial. The judge must be a commissioned officer, a member of a bar, and have been certified as a military judge after appropriate training.[36] The "jury" who hears a court-martial is composed of other soldiers, with requirements of rank that depend in part on the rank of the accused.[37] A judge advocate is assigned as defense counsel.

Concerns about the effect of rank on decision-making create issues of whether a superior officer has exercised "unlawful command influence" in the court-martial.[38] A commander may not "censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence . . . , or with respect to any other exercise of the functions of the court-martial . . . ."[39] Violations of these rules can cause a conviction to be voided.

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[31] 10 U.S.C.S. § 867 (Supp. 1999). The former name for the Court was the more euphonious Court of Military Appeals. Id. However, its acronym of "COMA" was likely considered unfortunate.

[32] 28 U.S.C.S. § 1259 (1988); 10 U.S.C.S. § 867a (Supp. 2001).

[33] 10 U.S.C.S. §§ 813, 818-820 (1999)

[34] 10 U.S.C.S. § 822 (1999).

[35] 10 U.S.C.S. §§ 823-824 (1999).

[36] 10 U.S.C.S. § 826 (1999).

[37] 10 U.S.C.S. § 825 (1999).

[38] R.C.M. 104.

Rules for Courts-Martial set out in considerable detail the procedures to be followed throughout, beginning with the referral of charges and continuing through post-trial.[40] Further, rules of evidence similar to the federal rules have been adopted.[41] In order to facilitate comparisons with the rules established in March 2002 for trial of terrorists,[42] some of the significant terrorist tribunal rules will be explained, followed by their general court-martial equivalents.

(1) The person entitled to bring charges against a suspected terrorist is the Secretary of Defense, though that authority may be delegated.[43] For a general court-martial, charges are referred by a high-ranking military commander as designated by statute, usually at the soldier's installation.[44]

(2) The Secretary of Defense or a designee will appoint members to a military commission for trial of an accused terrorist; the tribunal will consist of from three to seven commissioned officers, while a presiding officer who must be a judge advocate will be chosen from the members.[45] For a general court-martial, at least five members and a military judge are appointed by the person who convened the

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[39] R.C.M. 104 (a)(1).

[40] RC.M. 101-1306.

[41] STEPHAN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 101-1103 (1981).

[42] Military Commission Order No. 1, Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism, Dept. of Defense, Mar. 21, 2002, *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf [hereinafter DOD Order].

[43] DOD Order § 2.

[44] R.C.M. 504; 10 U.S.C.S. § 822 (1999). Before such a referral, an independent investigation determines if probable cause exists; no equivalent procedure is mandated for suspected terrorists. 10 U.S.C.S. § 832 (1999). This is called an "Article 32 investigation." The precise elements of offenses for which charges might be brought against suspected terrorists are not defined in the President's or the Defense Department's order; elements of the offenses that may be committed by service members are statutorily specified. 10 U.S.C.S. § 877-934.

[45] DOD Order §§ 4 A(2), A(4).

proceedings.[46]

(3) The prosecutors and defense counsel for the accused terrorists are judge advocates, with the suspect having the right to select a civilian attorney.[47] The same rules exist for a court-martial.[48]

(4) The accused terrorist is presumed innocent until proven guilty, must have guilt proven beyond a reasonable doubt, is entitled in advance to discovery of all evidence to be used by the prosecution, may testify at trial at his or her election, is entitled to be present at all times, and may not twice be placed in jeopardy.[49] These rights are also a soldier's rights in a court-martial.[50]

(5) The trial of a terrorist is public except in limited circumstances, primarily when needed to protect classified information or for safety reasons.[51] A court-martial is also public unless "exigencies" require closure.[52]

(6) Evidence is admissible at a trial of a terrorist if it "would have probative value to a reasonable person."[53] At a court-martial, the Military Rules of Evidence are applicable, which are similar to the federal evidentiary rules.[54]

(7) In the trial of an accused terrorist, conviction requires the concurrence of two-thirds of the members, except that a death sentence requires unanimity.[55] A court-martial has the same requirements.[56]

(8) If there is a conviction, a transcript of the trial is prepared and it, along with all other exhibits, is forwarded to the officer who named the members of the commission; if the appointing authority upholds the findings and sentence, a

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[46] R.C.M. 501, 503.

[47] DOD Order §§ 4 B-C.

[48] R.C.M. 501(b), 506.

[49] DOD Order § 5.

[50] R.C.M. 701, 804, 907(b)(2)(C), 916(b), 920(e)(5)(A); M.R.E. 301.

[51] DOD Order § 6B(3).

[52] R.C.M. 806.

[53] DOD Order § 6D.

[54] M.R.E. 101-1105. Essentially, standard rules regarding the need for a hearsay exception exist in the military rules. M.R.E. 801-806.

[55] DOD Order § 6F.

[56] R.C.M. 921.

review panel consisting of three military officers will consider the appeal, which will then either forward a recommendation to the Secretary of Defense or remand for further proceedings.[57] The President, or at his delegation the Secretary of Defense, will make the final decision in the review process, which may include reversing a finding of guilt or reducing it to guilt of a lesser-included offense. The President may also "mitigate, commute, defer, or suspend the sentence imposed or any portion thereof."[58] Similarly, after a court-martial conviction, a transcript of the proceedings and the exhibits are compiled into the record, and the accused may make limited additional submissions at that time; the record is reviewed and a recommendation made by the staff judge advocate for the convening authority.[59] The convening authority may take action on the sentence and usually also on the findings; the convening authority may only lessen the sentence or set aside findings of guilt, and may order a rehearing.[60] The Judge Advocate General for that service then reviews the record including the initial post-trial review that has occurred, and notes what appear to be legal errors or other matters requiring corrective action.[61] Unless the punishment is relatively minor, The Judge Advocate General refers the record to the service's Court of Criminal Appeals, where the appeal will be heard by a panel of three military officers; further appeal may be taken to the Court of Appeals for the Armed Forces and, at times, to the Supreme Court.[62]

There is yet another procedure potentially available. Though not written into the commission's rules, terrorism suspects may seek a writ of habeas corpus according to White House Counsel Alberto Gonzales.[63] The Commission rules themselves provide that no relief may be sought in any United

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[57] DOD Order § 6H.

[58] DOD Order § 6H(6).

[59] R.C.M. 1103-1106.

[60] R.C.M. 1107.

[61] R.C.M. 1112.

[62] R.C.M. 1201, 1203-05.

[63] Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

States court.[64] A soldier has the same constitutional right as other citizens to seek a writ of habeas corpus to challenge the legality of detention.[65]

With some procedural relaxation as to preferring charges and on evidence, and perhaps with a greater likelihood of closing the trial to the public, the procedures for the trial of suspected terrorists conform quite closely to those applicable to soldiers subjected to court-martial. The appellate processes differ, but in both there is multi-stage review on the record. The variations from normal civilian trials are not that numerous either, though a conviction on a two-thirds vote of the "jury" is an exception. The military has gone to considerable lengths to provide to suspected terrorists a process similar to that available for its own soldiers.

Stepping back from active duty soldiers and *al Qaeda* suspects, a different perspective on these rules arises when we recall that a soldier while on duty in the Mississippi National Guard also may be subject to a court-martial. The procedures under state military law have not always been the same as those applicable to soldiers in federal service. There has been a largely unknown, one might say "camouflaged," judicial system to which those serving in the Mississippi militia have always been subject. A review of the earliest state statutory rules has been ably conducted by a University of Mississippi professor of law.[66] For a considerable period of time, a court-martial sentence of imprisonment was not effective until reviewed by the "commander-in-chief," i.e., the governor.[67] The state's Judge Advocate General could be asked to review the records of the court-martial prior to a final decision, but that apparently was optional.[68]

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[64] Military Order, *supra* note 1, § 7(b)(2).

[65] 28 U.S.C. § 2241 (2000); *Preiser v. Rodriguez*, 411 U.S. 475, 485-86 (1973) (stating writ of habeas corpus is "available to effect discharge from any confinement contrary to the Constitution or fundamental law").

[66] Michael H. Hoffheimer, *Mississippi Courts: 1790-1868*, 65 MISS. L.J. 99, 133-36, 161-62 (1995).

[67] MISS. CODE ANN. § 5624 (1917); MISS. CODE ANN. § 8566 (1957).

[68] MISS. CODE ANN. § 8570 (1957). The position of a state Judge Advocate General was not statutorily described until later. Before then, the position was part of a generic mandate for an Adjutant General's staff who "may be required

In 1966 this discretionary approach became a mandate as the full-time position of State Judge Advocate was created. The officer was to be appointed by the governor on the recommendation of The Adjutant General.[69] The State Judge Advocate, among other duties, reviews each court-martial in which a bad-conduct discharge had been ordered; a three-officer ad hoc board of review could be named by the State Judge Advocate as an alternative to his own review of appeals.[70]

The 1966 statutory procedures, especially the board of review, were similar to those in the federal Uniform Code of Military Justice.[71] In 1968 the federal statutes were changed to abandon the boards of review and to create the previously described Courts of Military Review (now called Courts of Criminal Appeals) for each military service.[72] It was on this new foundation that the Mississippi legislature in 1981 created a somewhat similar model, "to revise and update the Mississippi Code of Military Justice in conformity with the Uniform Code of Military Justice. . . ."[73] The rules apply "to

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from time to time properly to conduct the operations" of the Military Department. *Id.* at 8530.

[69] MISS. CODE ANN. § 8529-06 (1942 & Supp. 1972). The state legislature in 1966 adopted the Uniform Code of Military Justice that had been approved in 1961 by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association. UNIF. CODE OF MIL. JUST., 11A U.L.A. 71 (1995). No systematic comparison of the uniform law and the 1966 enactment has been made by this author. Even if the initial state military code was a relatively faithful adoption of the uniform law, at least one significant set of changes occurred in 1981 which will be discussed below. Mississippi's current code is said to be "a substantial adoption of the major provisions of the Uniform Act, [but] it departs from the official text in such manner that the various instances of substitution, omission and additional matter cannot be clearly indicated by statutory notes." *Id.* at 72.

[70] MISS. CODE ANN. § 8529-66 (1942 & Supp. 1972).

[71] A.B. Butts, *The Uniform Code of Military Justice,* 22 MISS. L.J. 203, 206-7 (1951) (explaining new procedures of UCMJ including boards of review for appeals).

[72] 10 U.S.C.A. § 866 (2000).

[73] Act of March. 18, 1981, ch. 362, 1981 Miss. Laws 806. The Act was almost a verbatim copy of a similar enactment in Texas. TEX. GOV'T CODE ANN. § 432.109 (Vernon 1998 & Supp. 2002). Texas modeled its court and procedures closely on the UCMJ, creating it in 1975, which was six years before Mississippi's statute was passed. 1975 TEX. GEN. LAWS 287 (information from LTC Bill Reimer,

all members of the state military forces who are not in active federal service."[74] When activated into federal service, Guardsmen are subject to the federal rules.

A variety of changes to court-martial procedures were made. The boards of review that could be created for a specific case at the discretion of the State Judge Advocate were abolished and were replaced by the newly formed Mississippi Court of Military Appeals.[75] For "persuasive authority," the court was instructed to examine but would not be bound by the decisions of what is now the United States Court of Appeals for the Armed Forces and the lower federal military courts.[76] The finality of review was described this way:

> The appellate review of records of trial provided by this code, the proceedings, findings and sentences of court-martial as reviewed and approved, as required by this code, and all dismissals and discharges carried into execution under sentences by court-martial following review and approval as required by this code, are final and conclusive. Orders publishing the proceedings of the court-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies and officers of the state, subject only to action upon a petition for new trial as provided in section 33-13-425.[77]

This would appear to prevent Mississippi Supreme Court review of a final decision of the Court of Military Appeals. A right of appeal is derived only from a statute. Absent a statute, there is no right.[78] Somewhat older authority provides that an "appeal is not a matter of right, and lies only when authorized by law."[79] No statute explicitly authorizes an appeal from the Court of Military Appeals to any civilian court. The legislature

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state Judge Advocate General, Texas Army National Guard, is gratefully acknowledged).

[74] MISS. CODE ANN. § 33-13-7 (2000).

[75] Act of March 18, 1981, ch. 362, 1981 Miss. Laws 806, *codified at* MISS. CODE ANN. § 33-13-417 (2000).

[76] MISS. CODE ANN. § 33-13-419 (2000).

[77] *Id.* at § 33-13-431.

[78] Bickham v. Dep't of Mental Health, 592 So. 2d 96 (Miss. 1991).

[79] Jones v. Cashin, 98 So. 98 (Miss. 1923).

has through this statute provided for appellate review outside of the normal civilian courts. Whether the Mississippi Supreme Court would find other principles to apply on this question remains for an appeal that properly raises the issue.

The Court of Military Appeals is created, staffed, and given its mission all in one section of the Code.[80]

(a) The court is composed of five judges appointed by The Adjutant General after receiving recommendations from the State Judge Advocate; terms are six years, with the initial terms staggered such that one judge received a two-year term, two others received four-year terms, and the final two received six-year terms.[81]

(b) The Adjutant General also appoints the chief judge.[82]

(c) To be eligible as a judge, a person must be (i) a member of the Mississippi Bar; (ii) a member of a federal bar; (iii) "a commissioned officer of the state military forces, active or retired, or a retired commissioned officer in the reserves of the Armed Forces of the United States of America"; (iv) in the active practice of law for at least five years; and (v) have at least five years' experience as a lawyer with the National Guard. The last two credentials can be met by equivalent experience in federal military service.[83]

(d) The court adopts its own procedural rules; the necessary quorum is three judges.[84]

(e) The Adjutant General may remove a judge for cause, after notice and hearing. The basis can be neglect of duty, malfeasance in office, or mental or physical disability.[85]

(f) The court has appellate jurisdiction to review all but summary courts-martial, and also any court-martial in which a member of the appellate court determines "that there may be a constitutional issue involved."[86]

(g) Review is discretionary. Within sixty days of notice being received of final action by a court-martial authority, the accused may petition the Court of Military Appeals for review. If the court denies review, the court-martial judgment becomes final. On the other hand, if review is granted, the court may "stay or defer service of the sentence of confinement or any other punishment under this code until the court's final decision upon the case."[87]

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[80] MISS. CODE ANN. § 33-13-417.

[81] *See id.* § 33-13-417(1)(a).

[82] *Id.*

[83] *Id.*

[84] *See id.* § 33-13-417 (1)(b).

[85] *See id.* § 33-13-417 (1)(c).

[86] *See id.* § 33-13-417(2).

(h) If the court "sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed. After the Mississippi Court of Military Appeals has acted on the case, the record is returned to the State Judge Advocate who notifies the convening authority of the court's decision."[88]

Though the court was created in 1981, it has had only one petition for review to consider. The explanation is that in the National Guard, extremely few courts-martial are conducted. The alternative of "nonjudicial punishment" is available in the Guard, and involves a hearing before the soldier's commander or designee.[89] These are referred to as "Article 5" procedures in reference to the article number of the Mississippi Code of Military Justice that sets them out.[90] Punishments are less severe, though the effect can be quite adverse to the likelihood that the soldier will be retained when the end of the period of enlistment is reached, or that an officer will be promoted. Appeal is to the next level commander, with the only issue being that the punishment is too severe.[91]

Proceedings to separate the soldier from the military without any concomitant criminal penalties, are also frequently used for such matters as drug use or other misconduct.[92] If drug use is discovered by a random drug test, it would be difficult if not impossible to show that the part-time Guardsman was in military status when ingesting the drugs. Therefore, a court-martial would be problematic. Administrative separation based on the drug test is the usual choice. In summary, if a Guardsman commits a crime that is also an offense under civilian law, that soldier will almost certainly be prosecuted only by civilian authorities. If the soldier's offense is not prosecutable in a civilian court, the Guard will utilize remedies less than a court-martial.

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[87] *See id.* § 33-13-417(3).

[88] *See id.* § 33-13-417(5).

[89] *See id.* § 33-13-31.

[90] *See id.* § 33-13-31.

[91] *See id.* § 33-13-31(5).

[92] AR 135-175 (Feb. 28, 1987) (separation of officers); AR 135-178 (Dec. 3, 2001) (separation of enlisted personnel). These regulations adopt the hearing pro-

Nonetheless, the Mississippi Court of Military Appeals has been mobilized and deployed one time. That occasion was extraordinary for a host of reasons. To understand the significance of the case, a quick review of the structure of the National Guard and its leadership is useful.

The United States Constitution grants to Congress this power:

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[93]

The United States Supreme Court found that these clauses arose from twin fears: (1) a national standing army was a threat to individual liberty and state sovereignty; (2) state militia soldiers were too poorly trained at that time to provide meaningful defense.[94] Since passage of the federal Militia Act of 1792, each state has been required to have an Adjutant Gen-

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cedures of Army Recognition 15-6, which involves a board of officers to consider charges against a soldier. AR 15-6 (Sept. 30, 1996). A board recommendation to separate is then reviewed by the authority who appointed the board. *Id.* The National Guard utilizes these procedures. The Adjutant General is the official who reviews the recommendation. There is no appeal from TAG's decision to separate.

[93] U.S. CONST., art. I, § 8, cl. 15-16.

[94] Perpich v. Dep't of Def., 496 U.S. 334, 340-46 (1990).

eral to serve as the chief administrative head of the state militia.[95] Referring to the militia as the "National Guard" had its genesis with a New York militia regiment that styled itself in the early 1800's as the "National Guards;" by the time of the War Between the States, New York used that name for all its militia units.[96] Even before the National Guard Association was formed in 1878, most states had adopted the new designation for their militas.[97]

The Adjutant General as the chief administrative officer is not the soldier who would lead troops into battle. There are different combat units within the Guard, each with a commanding officer. The Adjutant General initially was not even a general but only a lieutenant colonel; the rank was raised in 1821 to colonel, in 1837 to brigadier general (one star), and in 1950 to major general (two stars).[98] The position of Adjutant General first became an office recognized by the constitution in 1869, and it also appears in the 1890 state constitution.[99]

As previously discussed regarding "The Judge Advocate General," the proper printing of the title for the Mississippi National Guard's highest officer is "The Adjutant General" (TAG).[100] The current term of service for The Adjutant General of the Mississippi National Guard is four years which begins with a new governor's term.[101] A statute perhaps unconstitutionally provides that the term begins one month after the commencement of a governor's term or until a successor qualifies.[102] There is some practicality to that, however, since this significant officer can only be named once the identity of the governor is known.

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[95] Militia Act, ch. 33, § 6, 1 Stat. 271, 273 (1792).

[96] RUSSELL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 157, 214 (1967).

[97] *Id.* at 282. The National Guard Association's internet homepage refers to its 1878 origins this way: "In the first constructive meeting of officers from the North and South after Reconstruction, the organizational meeting of the NGAUS had the goal of obtaining better equipment, standardized training and a more combat-ready force by petitioning Congress for resources." Nat'l Guard Ass'n of the U.S., *at* http://www.ngaus.org/whatisngaus/whatisngaus.asp (last visited Oct. 5, 2002.

[98] MISS. CODE MILITIA § 1 at 333 (Turner 1816) (lieutenant colonel); Act of Feb. 10, 1821, ch. 42 § 5, 1821 Miss. Laws (colonel); MISS. CODE ch. 16, art. 2, tit. 2, § 1 (Hutchinson 1848) (brigadier general); Act of Jan. 24, 1962, ch. 140, § 11, 1861 Miss. Laws (colonel); MISS. CODE § 2195 (1871) (brigadier general); 1950 Miss. Laws, ch. 444, § 3 (major general).

[99] MISS. CONST. 1869, art. IX, § 7; MISS. CONST. art. 9, § 219. An "adjutant" is a staff officer who assists a military commander with administrative duties. There was one officer in the United States Army with the title of "The Adjutant General." In the Department of Defense Reorganization Act of 1962, that position was abolished and its functions transferred to the Secretary of Army. 10 U.S.C.S. § 3036 (2000).

[100] Mississippi College School of Law has had both a former TAG and a former

The delay in determining the official winner of the 1999 gubernatorial election between Lieutenant Governor Ronnie Musgrove and former United States Congressman Mike Parker suggests one practical problem that can arise if TAG's term begins simultaneously with the governor's.[103] Practicality and law do not always meet, however, and it is difficult to see how the required one-month statutory delay can be reconciled with the constitution. On the other hand, holding over until a successor is qualified is common law consistent with the constitution.

Therefore the office of The Adjutant General is the highest position that can be attained in the National Guard. It is a full-time position and is relatively well-paying for a state government office.[104] Only the governor as commander-in-chief outranks him when the Guard is in state service.[105] Since the Adjutant General is the executive head of the state agency known as the Mississippi Military Department,[106] as well as the commissioned military officer to whom all other officers of

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TJAG as deans. Major General E. A. "Beby" Turnage served as TAG from 1972 to 1976, then from June 1979 until August 1981 was dean of Mississippi College School of Law. He was succeeded by a TJAG. Major General Alton Harvey, dean of Mississippi College from August 1981- May 1991, finished his career in the Army as TJAG from 1979-1981, cutting short his four-year term to assume the position at Mississippi College. Information provided by Mississippi College School of Law; Percival D. Park, *The Army Judge Advocate General's Corps, 1975-1982*, 96 MIL. L. REV. 5, 10-11 (1982).

[101] MISS. CONST. art. 9, § 219.

[102] MISS. CODE ANN. § 33-3-7 (2000).

[103] Musgrove was the ultimate winner, but only after the state House of Representatives selected him on January 4, 2000, since neither candidate had received a majority of the total vote. 2000 MISS. HOUSE J. 32-33.

[104] State salary is $80,000. MISS. CODE ANN. § 25-3-33 (1999 & Supp. 2002).

[105] *See id.* § 33-3-3 (2000).

[106] *See id.*

both the Army and Air Guard answer,[107] he is the state equivalent of Secretary of Defense and Chairman of the Joint Chiefs of Staff all in one person.

The position has not been a springboard to political office in the last century.[108] Over the last fifty years, appointment has usually been the culmination of a long military career with an assist from some connection to the successful gubernatorial candidate. Only a few have been well-known outside of military circles. Named by Governor Ronnie Musgrove after his hard-fought and delayed 1999 election victory was General George S. Walker. The Senate Veterans and Military Affairs Committee tabled the nomination. The 2000 legislative session ended in May with no further action being taken. The governor soon named General Walker as the senior Assistant Adjutant General and his Special Advisor on Military Affairs with authority to perform the duties of the Adjutant General. An Attorney General's opinion was issued in July that found as a matter of statutory construction that the governor could not make this appointment of an assistant adjutant general until there was an adjutant general to make a recommendation.[109] General Walker resigned.

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[107] *See id.* § 33-3-9.

[108] No Adjutant General has apparently sought statewide office since the nineteenth century. A few ran for other offices. Jim Farmer, the Adjutant General whose court-martial is discussed later in this article, ran for state senate in 1991 as his contentious four-year term wound down; he was defeated. Beby Turnage had been a circuit judge before his service as Adjutant General from 1972-1976. In the 1800's, Adjutants General often were drawn from the pool of traditional politicians: Wiley P. Harris (senator 1825-30; Adjutant General 1830, 1846-1847; defeated for Governor 1831; circuit judge 1847-1853); Matthew D. Patton (Adjutant General 1830-31; defeated for Secretary of State 1831; Attorney General 1834-37); Buckner Harris (Adjutant General 1831-32; senator 1832-33; circuit judge 1837-1841); Henry Foote (Adjutant General 1834; representative 1839; U.S. Senator 1847-52; Governor 1852-54); B.C. Buckley (Adjutant General 1844; representative 1844); Beverly Matthews (representative 1858-62; Adjutant General 1861); Jones S. Hamilton (Adjutant General 1862-63, 1898; senator 1884-88); Albert G. Packer (senator 1870-76; Adjutant General 1874-76); Kinloch Falconer (Adjutant General 1876-78; Secretary of State Jan.-Sept. 1878); William Henry (Adjutant General 1886-1904; Jackson mayor 1888-93; secretary of senate 1894). This information is largely from lists of state legislators, judges and other officials from 1817-1917, in MISS. OFF. & STAT. REG. (1917), and from a partial list of Adjutants General from 1798-1990, in MISS. MIL. DEPT. ANN. REP. 1989-1990, at 74-75 (1990), as supplemented by Jerry Causey (ed.), *Selected Correspondence of the Adjutant General of Confederate Mississippi*, 43 J. MISS. HIST. 31, 35 n. 16 (1981), and OFFICE OF MISS. SECRETARY OF STATE, REGISTER OF COMMISSIONS (volumes for 1871-1891), on file at Miss. Dept. Arch. & Hist. These records reveal that the incumbent, Maj. Gen. James H. Lipscomb, III, is approximately the fifty-third Adjutant General since statehood.

Twelve years before General Walker's ordeal, the judges on the dormant Mississippi Court of Military Appeals would have had no reason to believe that the naming of The Adjutant General following the election of Ray Mabus as governor would later have an impact little short of nuclear for their court. When Democratic nominee Ray Mabus's narrow victory over Republican nominee Jack Reed became secure in the early morning hours of Wednesday, November 4, 1987, among those who may have still been awake to see the results were Guard officers who were eligible for consideration as The Adjutant General.[110] Now they knew for certain who would be making the decision. Almost three months later, the governor named Arthur James (Jim) Farmer.[111] As is usual, the new TAG had excellent connections with his commander-in-chief. Farmer was a retired airline pilot and long-time member of the Guard.[112] He had raised significant funds for the Mabus campaign, personally contributed a large amount, and flew candidate Mabus across the state.[113]

In January 1990, two years after Major General Farmer had been named TAG, news reports revealed that The Adjutant

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[109] Employment of Assistant Adjutant General, Op. Miss. Att'y Gen. No. 2000-0275 (July 14, 2000) *available at* 2000 WL 1207463, referring to MISS. CODE ANN. § 33-3-9 (Rev. 2000).

[110] Mabus received 385,689 votes to Jack Reed's 336,276. 1988-1992 Miss. Reg. 494-95 (1989). Rebecca Pittman, *Mabus at the Gate*, JACKSON J. OF BUS., Jan. 1988, at 1, 19 (discussing supporters' late election night watch).

[111] *Crystal Springs' Jim Farmer Appointed Mississippi's Adjutant General*, METEOR (Crystal Springs, Miss.), Feb. 3, 1988, at 1. Farmer was named The Adjutant General on January 29, 1988. *Id.*

[112] *Id.*

[113] General Farmer had given Mabus at least $6,970; no report of a person's efforts to raise contributions from others is publicly maintained. *Ray Mabus, Democrat, Ackerman,* CLARION-LEDGER (Jackson, Miss.) Nov. 1, 1987, at 1H. A columnist later said that General Farmer was able "to claim the post as an apparent reward for his fealty and service to Mabus during his 1987 campaign." Sid Salter, *Mabus' Political Move had Reaped Military Harvest: Farmer Returns*, CLARION-LEDGER (Jackson, Miss.), Mar. 10, 1991, at 3H.

General and two others had in 1989 purchased land near the entrance to the Guard's Camp Shelby facility outside of Hattiesburg.[114] The charge was that he used confidential information regarding a possible expansion of Camp Shelby to purchase land that would thereby increase in value.[115] That same month, the Governor twice asked General Farmer to resign, and said that he would have removed Farmer from office if the authority existed to do so.[116] The general sold his interest in the land and refused to resign.[117] Since the constitution gives to The Adjutant General a term that "shall expire with the governor's term of office," there appeared no right to fire him.[118] Instead, the Governor in February 1990 assigned the daily operational responsibilities for the Guard to Brigadier General Denver Brackeen, who was an assistant adjutant general.[119] The Adjutant General himself was assigned special projects, none of which had much significance, while the responsibilities but not the title of The Adjutant General were assumed by General Brackeen.[120]

In mid-April, General Farmer tried to retake his office at the state Guard headquarters. After physically occupying the office for part of a day he stated, "I just reaffirmed my position as adjutant general. I walked into my office and took it back over, in essence."[121] Lieutenant Governor Brad Dye, acting as governor while Mabus was absent on a trade mission in Asia, sent in state highway patrol officers to escort The Adjutant General out.[122] The acting governor also declared in writing that all facilities of the National Guard were off-limits to General Farmer.[123]

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[114] James Rickets, *National Guard General Buys Land Near Shelby Gate*, CLARION-LEDGER (Jackson, Miss.), Jan. 14, 1990, at 1A.

[115] *Id.*

[116] Alan Huffman, *Mabus Strips Guard Leader of Duties*, CLARION-LEDGER (Jackson, Miss.), February 10, 1990, at 1A.

[117] *Id.*

[118] MISS. CONST. art. 9, § 219.

[119] Many Guardsman had believed prior to the Governor's naming General Farmer that General Brackeen was going to become The Adjutant General. Salter, *supra* note 12. Then there was speculation that Farmer was to serve for only part of the four-year term, then resign in order that Brackeen could be appointed.

[120] Huffman, *supra* note 114.

[121] Jay Eubank, *Ex-Guard Leader Stopped from Retaking Control*, CLARION-LEDGER (Jackson, Miss.), April 20, 1990, at 1A.

[122] *Id.*

The Adjutant General took the next public step on May 1, 1990 by filing a lawsuit in federal district court seeking a declaratory judgment that Governor Mabus's actions were unconstitutional and a violation of statute.[124] With a hearing in the federal suit scheduled for June 28, the Governor acted.[125] On June 15, 1990, three charges with multiple specifications were brought against Major General Arthur Farmer under the Mississippi Code of Military Justice.[126] The charges were for being absent without leave from the office assigned him by the Governor and instead attempting to return to the offices of the Mississippi Military Department; failure to obey the Governor's orders to coordinate all his actions through the governor's office; and bringing discredit to the armed forces by purchasing a tract of land near an entrance to the National Guard's Camp Shelby and by wearing the two stars of the adjutant general's rank when that rank had been withdrawn by the Governor.[127]

After charges are made, a military investigation is to occur.[128] The investigation concluded that a court martial proceeding was justified on the basis that General Farmer had created a conflict of interest by participating in the purchase of land adjacent to Camp Shelby, violating section 33-13-529.[129] On October 18, 1990, the Governor ordered that The Adjutant General stand trial for that charge by a general court martial.[130]

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[123] *Id.*

[124] Farmer v. Mabus, 757 F. Supp. 1462, 1466 (S.D. Miss. 1991). Federal District Judge Barbour granted summary judgment in favor of General Farmer on March 6, 1991. *Farmer*, 757 F. Supp. at 1467-68, *rev'd* 940 F.2d 921 (5th Cir. 1991).

[125] Jerry Mitchell, *Mabus Begins Process to Court-Martial General Farmer*, CLARION-LEDGER (Jackson, Miss.), June 16, 1990, at 1A.

[126] Mitchell, *supra* note 126; *see also* MISS. CODE ANN. § 33-13-251 (2000).

[127] The offenses are set out as a note to the opinion of the Mississippi Court of Military Appeals. The information comes from the files of the court-martial of General Farmer.

[128] MISS. CODE ANN. § 33-13-255 (2000).

[129] *Farmer*, 757 F. Supp. at 1466-67.

[130] Miss. Code Ann. § 33-13-155.

The federal court litigation and the court-martial continued on parallel tracks. A motion to stay the court-martial was denied by District Judge Barbour.[131] Ultimately, the United States Court of Appeals for the Fifth Circuit found the federal claims to be non-justiciable and dismissed.[132]

On October 23, 1990, General Farmer moved to dismiss the charges because of alleged unlawful command influence by Governor Mabus. Lieutenant Colonel William Eshee, the presiding military judge, found that General Farmer presented sufficient evidence to create a prima facie case of discriminatory intent on the part of the Governor, who was the convening authority for the court-martial.[133] The charges were dismissed.

The State appealed, then moved to restyle the proceedings and asserted that it was seeking a writ of mandamus directed to the military judge to reinstate the charges.[134] That "restyling" apparently was because under Rule 6 of Practice and Procedure of the Court of Military Appeals, "the accused shall be the appellant in all cases."[135] It is that appeal that led to the first convening of the Mississippi Court of Military Appeals. It conducted a hearing on May 18, 1991. It affirmed dismissal of the charges after accepting the finding of unlawful command influence as being one that was within the trial judge's discretion.[136]

Neither side sought further relief after the Court of Military Appeals entered its decision on August 3, 1991. Seventeen days later the Fifth Circuit Court of Appeals dismissed Farmer's claims. The governor's election was three months away and General Farmer's term as The Adjutant General would expire two months after that. General Farmer continued to be blocked from assuming his duties as The Adjutant General, but the suspension with pay that had been in effect since the court-martial process began was terminated.[137] A new governor was chosen, as was a new leader for the Mississippi National Guard.[138]

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[131] *Farmer*, 757 F. Supp. at 1467.

[132] *Farmer*, 940 F.2d at 925.

[133] State v. Farmer, No. 90-1 (Miss. C.M.A. Nov. 1, 1990) (*see* Appendix I). The syllabus prepared by the court clerk in this case outlines the grounds Lt. Col. Eshee used in making his decision. A copy of the transcript of the military judge's oral decision is filed in the records of *State v. Farmer*, Miss. Mil. Dept. LTC Eshee's initial decision found MG Farmer to be "not guilty," a finding that was deleted after the grant of a motion to amend.

[134] *See* Appendix I.

[135] *Farmer*, 940 F.2d at 923 n.5. According to the Fifth Circuit's opinion, these rules were promulgated "on November 1, 1990, the same day, apparently, as the military judge's dismissal of the charges." *Id.* Farmer argued that the State could not appeal the dismissal of the charges. *Id.* Authority for rule-making appears in MISS. CODE ANN. § 33-13-417(1)(b) (2000). A copy of the Rules is filed in the records of *State v. Farmer*, Miss. Mil. Dept.

[136] *See* Appendix I.

This camouflaged Mississippi Court of Military Appeals had a brief and rather intense call to duty, having to rule on the continuing service of the highest ranking officer in the National Guard. The Court, divided in the ultimate result, issued an opinion that explains some of the nuances of military justice.[139]

The procedures applied to General Farmer and available to other soldiers are, by definition, the process that is due. Though there are differences with the process due in civilian criminal courts, the military justice system is reasonably designed to provide protections parallel to those granted civilians while seeking the truth of charges that are brought. To provide suspected terrorists similar procedures does not appear to justify expressions of dismay.

For some individuals, to say that "military justice is to justice what military music is to music" is a positive statement. The music and the justice have more brass and fewer strings, and the tempo is more consistently brisk than with the civilian versions. Yet military music and military justice both result in credible performances.

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[137] Andy Kanengiser, *Farmer Back to Guard But Not As Chief*, CLARION-LEDGER (Jackson, Miss.), September 12, 1991, at 1B.

[138] *Biloxi Retiree Gets Major General Stars*, CLARION-LEDGER (Jackson, Miss.), January 18, 1992, at 3B. Governor Fordice named James H. Garner, Jr., as the Adjutant General. *Id.*

[139] *See* Appendix I.

APPENDIX

IN THE MISSISSIPPI COURT
OF MILITARY APPEALS
NO. 90-1
STATE OF MISSISSIPPI
PETITIONER
VERSUS
ARTHUR J. FARMER, ADJUTANT GENERAL OF THE
STATE OF MISSISSIPPI AND COMMANDER OF STATE
AREA COMMAND OF THE STATE OF MISSISSIPPI
AND
WILLIAM D. ESHEE, MILITARY JUDGE
RESPONDENTS
August 3, 1991

Syllabus by clerk of court: On June 15, 1990, three charges with multiple specifications were brought against Major General Arthur James Farmer, The Adjutant General, under the Mississippi Code of Military Justice, section 33-13-251 of the Mississippi Code. The charges were for a violation of section 33-13-471, being absent without leave from the office assigned him by the governor and instead attempting to return to the offices of the Mississippi Military Department; of section 33-13-483, which was a failure to obey the governor's orders to coordinate all his actions through the governor's office; and of section 33-13-529, of bringing discredit to the armed forces by purchasing a tract of land near an entrance to the National Guard's Camp Shelby, and by wearing the two stars of the adjutant general's rank when that rank had been withdrawn by the governor. General Farmer was suspended with pay from his position as adjutant general.

A military investigation of the charges under section 33-13-255 concluded that a court martial proceeding was justified on the basis that General Farmer had created a conflict of interest by participating in the purchase of land adjacent to Camp Shelby, violating section 33-13-529. On October 18, 1990, the Governor ordered that the Adjutant General stand trial on that charge by a general court martial under section 33-13-155.

On October 23, 1990, the accused moved to dismiss all charges because of alleged unlawful command influence by the Governor. After a hearing on November 1, 1990, the presiding military judge, Lieutenant Colonel William Eshee, found that General Farmer presented sufficient evidence to create a prima facie case of discriminatory intent on the part of the Governor, who was the convening authority for the court-martial. This was based on four areas of prima facie evidence: 1) the criminal proceedings were brought for ulterior reasons, proven by an excessive time lapse between the alleged wrongdoing and the initiation of charges, by the implications that the proceeding was commenced because of General Farmer's bringing of a suit in federal district court asserting alleged constitutional rights that were infringed by the governor, and other evidence that "tends to show that the Convening Authority wanted to be rid of the accused as Adjutant General as opposed to seeking discipline"; 2) the Convening Authority excluded all former Adjutants General as potential court members; 3) the prospective court members were not personally selected by the Convening Authority but by the Governor's staff; 4) listing General Bela Chain as a prospective court member showed a lack of impartiality since the accused had previously tried to have General Chain removed from a major command position. This proof shifted to the State the burden to disprove improper influence. The State presented no evidence but relied upon legal argument. At the conclusion of the hearing, the military judge sustained the motion and dismissed "the charges and specifications with prejudice."

On appeal the State moved to restyle the proceedings, asserting that it was seeking extraordinary relief under the Rules of Court-Martial 908 (a)(2), M.C.M (1984). The requested relief included a writ of mandamus directed to the military judge to reinstate the charges.

Held: The State's motion to restyle the proceedings was granted. The military trial judge had the responsibility to make reasonable inferences from the facts. The Court of Military Appeals did not have a definite and firm conviction that he was clearly erroneous or manifestly wrong. Therefore the dismissal of the charges based on unlawful command influence was affirmed.

Major John W. Land, Hattiesburg, and Captain Norman Gene Hortman, Jr., Laurel, for petitioner.

Major Dunnica O. Lampton, Magnolia, and Major Ron Feder, Gulfport, for respondent.

Before the full court, Judges Dorrance AULTMAN of Hattiesburg, Woodrow BRAND of Houston, Aaron CONDON of Oxford, Billy GORE of Clinton and Donald KRUGER of Prentiss.

KRUGER, Chief Judge, for the Court:

This matter is before the Court on Notice of Appeal by the State, Motion of the Respondent Farmer to Dismiss the Appeal and upon Motion of the State to Restyle the appellate proceedings as a Petition for Writ of Mandamus. This Court has inherent power as a court of law to hear and determine petitions for extraordinary relief such as mandamus and no legislative enactment is prerequisite to the exercise thereof. This Court unanimously chooses to exercise that power. Therefore, the Motion to Dismiss is overruled and the Motion to Restyle the Proceedings is sustained.

The dispositive issue before the Court remains: Is the dismissal of the charges by the Military Judge, based upon what he designates as unlawful command influence, proper?

While this Court probably would not have reached the same factual conclusions as did the Military Judge, this is not the test. The test to be applied in determining this issue is whether or not the finding of fact of the Military Judge is clearly erroneous or manifestly wrong.

The record is massive. The facts are not in dispute, as the State offered no proof in rebuttal and relied solely upon cross-examination As this Court appreciates the law, this review is limited to a determination of whether or not, after a review of the entire record, the Court is left with a definite and firm conviction that a mistake has been made in the findings of fact. This Court is sharply divided on this point, just as reasonable men have always had perceptional differences on matters of judgment.

The law on unlawful command influence in the military is well settled. However, by whatever label, the principals here, both constitutional officers, constitute the top echelon of the state military. Consequently, there is neither a plethora of legal precedent to guide this Court in the application of the law to these principals, nor are we sufficiently endowed to permute any of the provisions of the State Constitution.

The issue of unlawful command influence was immediately raised by the Respondent Farmer and the Military Judge found there was sufficient evidence to raise a presumption of existence and the State then had the burden of rebuttal and must produce more than mere assertion of impartiality by positive demonstrable proof. The State failed to offer any proof in rebuttal.

The lower decision was significantly drawn from a sequence of events which the Military Judge considered to be more than mere coincidence. An analysis of his four principle findings of fact is somewhat nebulous, at best. His finding of fact that "based on the totality of the circumstances, a reasonable person would conclude that unlawful command influence has affected this case," constitutes apparent unlawful command influence and clearly puts the burden on the State to go forward. Existing and continuing doubt of the presence of unlawful command influence must be resolved in favor of the accused. The Military Judge is entitled under the law to every reasonable inference to be drawn from the facts and the record and we cannot say with any degree of incontestable certainty or with a definite and firm conviction that he was clearly erroneous or manifestly wrong in his findings.

AFFIRMED, by majority vote, AULTMAN and BRAND join this opinion.

DISSENT by Judge CONDON:

As stated by Chief Judge KRUGER, there is no dispute as to the evidentiary facts on which the Military Judge based his conclusion of unlawful command influence. However, I do not agree that this conclusion itself is a "finding of fact" It is, rather, a conclusion of law which is unsupported by the facts of record.

The holding below is stated to be based on four findings, namely:

1.Institution of court-martial proceedings after the filing of the accused's own suit in Federal District Court;

2. Exclusion of former Adjutants General from the pool of potential Members;
3. Failure of the Convening Authority to exercise independent judgment in selection of potential Members; and
4. Selection by the Convening Authority of a possibly hostile potential Member.

It is the position of this dissent that the cited findings of fact either are not supported by substantial evidence or are themselves insufficient individually or collectively to raise the presumption of unlawful command influence. The findings may be disposed of briefly as follows:

First: The institution of court-martial proceedings after the commencement of the federal action was considered by the Federal District Judge himself in his Order of 30 October 1990. Holding the court-martial action to be a proper exercise of Governor Mabus' discretionary authority as Commander in Chief of the Mississippi National Guard, Judge Barbour found as follows:

General Farmer advances bad faith and harassment on the part of Mabus as a motivating factor in the court martial. proceeding. . . . This Court does not find that General Farmer has provided sufficient evidence to suggest that the state court martial proceeding was instituted in bad faith for the purpose of harassment. . . . The charges underlying the court martial proceeding itself are sufficiently serious to refute the notion that the entire proceeding itself was instituted in bad faith or for the purpose of harassment. This Court finds that the transaction in question could legitimately be viewed as one with the potential to undermine public confidence in both General Farmer and the National Guard as a whole. As Commander-in-Chief of the Military Department of the State of Mississippi, Defendant Mabus acted within the legitimate scope of his duties in instigating an investigation of the transaction and in ultimately determining that the seriousness of the charges merited a court martial proceeding. The Court cannot conclude, based on these facts, that Governor Mabus has so exceeded his discretionary authority and duties as to constitute acts in bad faith or for the purpose of harassment within the meaning of (*Wilson* *v. Thompson,* 593 F.2d 1375). . . . "[1]

I agree with Judge Barbour that "the transaction in question could legitimately be viewed as one with the potential to undermine public confidence in both General Farmer and the National Guard as a whole"; and that Governor Mabus acted "within the legitimate scope of his duties" in instigating the court-martial proceedings. It also seems to me that the issue of prosecutorial bad faith, having been fully litigated between the parties to this action before a court of competent jurisdiction, is now res judicata, as it would have been had Judge Barbour reached the opposite conclusion.

Second: If expulsion of the former Adjutants General was an error of law, it is correctable by returning the case to the Convening Authority for an enlargement of the Member pool by inclusion of the excluded class. I would return the case to the Convening Authority for reconsideration of his exclusion of this class of officers.

Third: The finding that Governor Mabus was not personally involved in selection of potential Members is clearly without support in the evidence and rests on nothing more substantial than the use of the pronoun "we" by a staff member in testifying about the selection process. Use of the term was fully explained, both by the staff member and by General Farmer himself, as indicative of nothing more than the normal interaction of commander and staff. Furthermore, the contention that the Governor was insufficiently involved in the selection process is unrelated to the claim of unlawful command influence.

Fourth: The finding that Governor Mabus named Brigadier General Chain to the court-martial pool despite knowledge of possible animosity toward General Farmer is no evidence whatever of intent to influence the proceedings. The inclusion or exclusion of potential Members who are possibly challengeable for cause in any given case is in no way improper, since the convening order provides that the court-martial is to try "such persons as may be properly brought before it". A potential Member, because of personal bias, may be excused for cause in any given case. But his selection for the pool of potential Members subject to voir dire should not act to insulate the accused from trial on the merits, either alone or in combination with the other findings relied upon above.

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[1] [This quote is from October 30, 1990 ruling denying a temporary restraining order. Summary judgment was later granted to General Farmer. *Farmer v. Mabus,* 757 F. Supp. 1462 (S.D. Miss.), *rev'd* 940 F. 2d 921 (5th Cir. 1991), *cert. den.*, 502 U.S. 1058 (1992).]

In sum, there is no evidence at all that any effort has been made by anyone in the command structure to influence anyone in the court-martial system in any way.

Although this case has been argued throughout as one of command influence, the issue is properly stated in terms of a violation of the "accuser concept." The distinction between these issues is carefully analyzed by the Court of Military Review in *U.S. v. Allen*, 31 M.J. 572 (NMCMR 1990). Unlawful command influence is "impermissible command control." The accuser concept, on the other hand, "denotes someone who has such a personal interest in, or has predetermined the outcome of, the case that his judgment could reasonably be questioned." The *Allen* court cited *U.S. v. Fernandez*, 24 M.J. 77 (CMA 1986) as holding that the convening authority in referring a case to court-martial, acts in a prosecutorial role, rather than a judicial one, and that therefore the accuser concept does not apply to the referral for trial. In any event, unlike unlawful command influence, violation of the accuser concept is not jurisdictional, but entails disqualification of the convening authority only. *U.S. v. Ridley*, 22 M.J. 77 (CMA 1986). And disqualification of the only possible convening authority invokes the maxim of law that "where all are disqualified, none are disqualified". *Evans v. Gore*, 253 U.S. 245 (1920), cited in *Allen*, supra. The law does not favor a jurisdictional vacuum.

Whether the Convening Authority here is disqualified from performing the judicial duty of post-trial review is, of course, not before us now. That decision, if ever necessitated, should rest on a determination of the issue of personal animus, as opposed to official involvement. It is clear that every commander has an official interest in the enforcement of the laws. Such interest, however strong, is not per se disqualifying. There is a heavy burden on the accused to show that the convening authority is motivated by personal ill-will amounting to bad faith with a purpose to harass. That there was no such showing was precisely the finding of Judge Barbour in his Order of 30 October, above cited. I find nothing in the extended record of the proceedings below to warrant a different finding by the Military Judge, even if Judge Barbour's finding were not to be considered res judicata and dispositive of this issue.

Furthermore, I am troubled by the sweeping scope of the command influence argument in this case, where the accused is the highest-ranking military officer in the chain of command, and where the only possible convening authority is the civilian commander in chief, whose constitutional duty it is to control the military. If in this case Governor Mabus is disqualified to institute proceedings under the Mississippi Code of Military Justice, there is no one else who can perform this function, leaving the Adjutant General above the system of military justice that applies to every other member of the Mississippi National Guard. This result is one that should be accepted only where the possibility of a fair trial is much more in jeopardy than the meager evidence has shown here.

Accordingly, I respectfully dissent from the decision of the majority of this Court and would reverse and remand for trial on the merits after reconsideration by the Convening Authority of the exclusion of the former Adjutants General.

GORE, Judge, joins this dissenting opinion.

Note from Clerk of Court of Military Appeals.

No further action was taken.

There is no established means for publishing opinions of the Court. Thus this opinion was not submitted for publication by the 1991 Clerk of Court, Captain (now Lieutenant Colonel) Edward O. Pearson. Because this is the sole decision rendered by the Court of Military Appeals, a court authorized by Mississippi Code 33-13-417 and made final by section 33-13-431, publication in the *Mississippi Law Journal* could prove instructive.

UNE MAGOUILLE PLANETAIRE: THE UDRP IS AN INTERNATIONAL SCAM

An Independent Assessment of the Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers

Benjamin G. Davis[*]

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I. INTRODUCTION

Since at least its first case, worldwrestlingfederation .com,[1] the Uniform Domain Name Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN) has been an international scam. Its integrity is compromised and it is fatally tainted at its core. Through the Network Solutions, Inc (NSI), Verisign, Inc., Tomlinson, Zisko, Morosoli & Maser (TZMM) and M. Scott Donahey[2] chain, NSI's interest in the results of the 111 cases in which Mr. Donahey has served is projected. Due to non-disclosure and/or evident partiality, these results are compromised. These 111 cases are referred to and form part of the corpus of illustrations and/or precedents for the 4333 decisions so far rendered. The 111 cases taint the reasoning and, therefore, fairness of the other 4222 panels. Moreover, there is cause for concern that, in addition to the relationships described below, similar non-disclosures relating to other registrars and registries in the generic Top Level Domains (gTLD's) and country code Top Level Domains (ccTLD's) are occurring so that the taint is in fact of multiple origin and multidirectional. In short, the UDRP, as implemented, is not a reasonable policy.

This fundamental and glaring systemic failure to ensure

Patricia Hassett for her support and patience with regard to this work which was to be presented at the Third French-American Conference on Legal Practice and Technology of Syracuse University College of Law in October 2001 (canceled due to 9/11). While at the ICC, the author had hired Richard A. Horning, Esq. of Tomlinson, Zisko, Morosoli & Maser as outside counsel to assist with work on an online project. Mr. Horning did excellent work and the author wishes to dedicate in part this paper to him and the lessons he taught. This paper in its entirety, however, is dedicated to Mrs. Saba Wainapel. The author wishes to render homage to Chairman Michel Gaudet and Chairman Alain Plantey with whom he worked from 1986 to 1996 at the ICC International Court of Arbitration. Ces hommes demeurent deux grandes écoles de sagesse pour moi.

[1] World Intellectual Property Organization Case D1999-0001. All cases can be viewed at the Internet Corporation for Assigned Names and Numbers website at www.icann.org.

[2] The focus on M. Scott Donahey is solely due to the availability of information to evaluate the nondisclosure issue for a panelist. It is the nature of non-disclosure that it is difficult to gather information on the other panelists. That is the central concern with what is found in Section II as described in Section III.

the integrity of the UDRP process by the new and inexperienced ICANN, and the relatively new and inexperienced dispute resolution service providers (World Intellectual Property Organization (WIPO), the National Arbitration Forum (NAF), the now defunct Eresolution.com, and the CPR Institute for Dispute Resolution (CPR)) is profoundly disturbing. Even with the introduction of the highly experienced Chinese International Economic Trade Arbitration Commission and Hong Kong International Arbitration Centre joint effort as a new dispute resolution service provider, there is concern that the UDRP is already so fatally flawed that their remedial efforts will be to no avail.

A further urgent evil is that the UDRP in various forms is being expanded to new Top Level Domains (TLD's") other than .com, .net and .org, such as the "internationalized" and non-ASCII script domain names, the new gTLD's (.aero, .biz, .coop, .info, .museum, .name, .pro) and to 23 of the 243 ccTLD's.[3] For keyword type disputes, a variant of the UDRP has been instituted. Finally, the UDRP has been looked to as a model or precursor for still new forms of dispute resolution described as shrink-wrap arbitration.[4] In all these areas the UDRP, left unchecked, risks spawning more unfairness regardless of the merits of the alleged trademark holder's and the alleged cybersquatter's respective positions. It is this loss of neutrality that dooms the UDRP. This paper will explain why.

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[3] Press Release PR/2002/303, WIPO Continues Efforts to Curb Cybersquatting (Feb. 26, 2002), *available at* http://www.wipo.int/pressroom/en/releases/2002/p303.htm (last viewed on Jan. 3, 2003).

[4] One author, who is a member of the ICANN Task Force currently reviewing the UDRP, imagined UDRP-type processes for disputes between Internet users and Internet Service Providers, between Internet consumers and vendors for all credit card and banking disputes below a certain threshold amount for international shipments—INCOTERM/UCC incorporation of mandatory arbitration clauses in the fine or bold print as further possibilities. Examples of how these awards would be enforced included the agreed right to charge one's credit card to participate in the arbitration and to charge it with the result, certification of an arbitration award presented against shipping documents, certification of award presented for payment at a designated bank, the right to record the award as a judgment lien in the loser's jurisdiction and the right to report the award to credit reporting agencies. James A. Carmody, The UDRP Arbitration Experience and Future Use of Stipulated Arbitration, Crossborder Litigation and Dispute Resolution Conference, Center for International Legal Studies (Feb. 10-16, 2002) (on file with author).

Section II's original research describes the relationships between Network Solutions, Inc. Verisign, Inc., Verisign's outside counsel, and the panelist (the ring to rule them all) that permitted and permits Network Solutions to project itself into the decisions of the UDRP. Section III presents the arguments concerning the taint of the UDRP as a result of the relationships detailed in Section II. Section IV describes the results of the efforts deployed over the past three years and the imbalance of power resulting from the creation of the new Internet powerhouse of Verisign/NSI. Section V steps back and presents the true meaning of the UDRP failure by drawing on an emerging concept at the highest level of international alternative dispute resolution: the Watson-Edstrom Conundrum.

II. ONE RING TO RULE THEM ALL—NETWORK SOLUTIONS, INC., VERISIGN, INC., VERISIGN'S OUTSIDE COUNSEL, AND THE PANELIST

A. NSI

In 1992 at the end of the Bush (the father) Administration, NSI, initially a minority owned business participating in government contracts,[5] entered into the Cooperation Agree-

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[5] The Company was acquired by Science Applications International Corporation ("SAIC") on March 10, 1995 (the "acquisition"). Prior to the acquisition of the Company by SAIC, the Company's business included commercial and government contracts awarded to the Company on a competitive basis, including government contracts that were awarded to the Company partially upon the Company's then minority-owned status. The contracts which had been awarded to the Company based partially on the Company's then minority-owned status were transferred into a separately-owned entity prior to the acquisition of the Company by SAIC.

In November 1995, SAIC adopted a plan to transfer the Company's remaining government-based business to SAIC in order to enable the Company to focus on the growth of its commercial business, which includes registration and consulting services. This transfer was effective as of February 1996. The operating results of both the minority-based gov-ment with the National Science Foundation to perform registration services for second level domain names within the .com, .org, .net, .edu and .gov Top Level Domains (TLD's). The contract became effective January 1, 1993 (i.e., just before the start of the Clinton Administration) and included a three-month phase-in period, a five year operational period (commencing April 1, 1993 and ending March 31, 1998), and a six-month "flexibility period" through September 30, 1998.[6] NSI had many losses (See Table 1) and little traffic in its first years (See Table 2). In 1995, NSI's finances and traffic (See Tables 1 and 2) improved, particularly after it signed, on September 14, 1995 with the National Science Foundation, Amendment No. 4 to the Cooperation Agreement allowing it to charge for services at $50 a domain name/year (later reduced

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> ernment contract business and the remaining government-based business, are reflected as discontinued operations in the financial statements of the Company for all periods presented (Note 13). The commercial operations, as defined, are reflected as continuing operations in the financial statements of the Company for all periods presented.

Network Solutions, Inc. (NSI) 10-K filing with the U.S. Securities & Exchange Commission 65 n.1 (1998), *at* http://www.sec.gov/Archives/edgar/data/1030341/0000950133-98-001194.txt (last viewed on Jan. 3, 2003).

[6]

> In 1992, the Company entered into the Cooperative Agreement with the NSF, which had been funding the Defense Information Systems Agency ("DISA"), to perform registration services for second level domain names within the .com, .org, .net, .edu and .gov TLDs. Under the Cooperative Agreement, the Company was given the responsibility for ensuring the quality, timeliness and effective management of registration services to non-military Internet users and networks. The registration services provided by the Company under the Cooperative Agreement included second level domain name registration, domain name server registration and network number assignment, as well as autonomous system number assignment and IP address mapping and allocation for North and South America, the Caribbean and parts of Africa.
>
> The Cooperative Agreement became effective January 1, 1993. It includes a three-month phase-in period, a five-year operational period (commencing April 1, 1993 and ending March 31, 1998), and a six-month "flexibility period" through September 30, 1998. The Cooperative Agreement is subject to review by the NSF and may be terminated by the NSF at any time at its discretion or by mutual agreement. The NSF has stated that it will not be re-awarding a cooperative agreement at the end of the flexibility period.

Id. at 10-11.

to $35 a domain name/year).[7]

Table 1[8]—Net Income (loss) (in thousands)

Year:	1993	1994	1995	1996	1997
	$ (386)	$ (980)	$ (2,837)	($1,625)	$ 4,231

Table 2[9]—Net domain registrations (in thousands):

Year	1993	1994	1995	1996	1997
Net new registrations	13	24	141	489	960
Less: Registrations not renewed	—	—	(1)	(39)	(46)
Net registrations as of year end	13	37	177	627	1,541

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[7]

> Prior to September 14, 1995, the Company was reimbursed under the Cooperative Agreement by the NSF for providing registration services on a cost reimbursement plus fixed-fee basis. Effective September 14, 1995, the NSF and the Company amended the Cooperative Agreement to authorize the Company to begin charging customers a service fee of $50 per year for each second level domain name registered. Customers in the .com, .org and .net TLDs have paid a two-year services fee of $100 for initial registrations and $50 per year for registration renewals. Under the terms of the amendment to the Cooperative Agreement, 30% of the services fees collected have been required to be set aside to be disbursed in a manner approved by the NSF for the enhancement of the intellectual infrastructure of the Internet. These funds have not been recognized as revenue by the Company. With regard to registrations on or after April 1, 1998, the NSF and the Company have further amended the Cooperative Agreement to provide that (i) the Company will no longer charge or set aside a portion of the services fee for the enhancement of the intellectual infrastructure of the Internet and (ii) the Company's fees will be reduced to a two-year services fee of $70 for initial registrations and $35 per year for renewals.

Id. at 6-7.

[8] *Id.* at 38.

[9] *Id.* at 39.

However, by the end of 1997, NSI had to address a significant continuing risk of liability and drain on resources from the large number (3600) of domain names registered and in its database as sole registry over which some type of objection had been filed pursuant to then current U.S. law and NSI's domain name dispute policy. Forty-two lawsuits were filed in these cases; though none have been meritorious, they took significant top management personnel time and company money.[10] With the number of domain name registrations expanding (see Table 2), the risk of an increase in these types of disputes was significant.[11] If things remained unchanged and

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[10] See *infra* note 11.

[11]

> Domain Name Dispute Policy Administration. The Company's established domain name dispute policy is an integral part of the maintenance and administration of the Company's domain name registration business. This policy seeks to take a neutral position with regard to domain name disputes between trademark owners and domain name holders and is designed to address claims that a domain name registered by the Company infringes a third party's federal trademark. As of March 13, 1998, the Company had received over 3,600 written objections to the registration and use of certain domain names. Of these, approximately 1,960 were disputes in which the Company's domain name dispute policy was involved. Although 42 out of these situations have resulted in litigation involving the Company, as of March 13, 1998, no payments have been made by the Company to any plaintiff and only four of these cases are pending. The Company expends considerable management and legal resources in the development, refinement and administration of its domain name dispute policy. See "Item 3-Legal Proceedings."

SEC, *supra* note 5, at 8.

> Litigation. The Company is involved in several legal proceedings as described in "Item 3-Legal Proceedings." As of March 13, 1998, the Company was a defendant in 6 lawsuits involving domain name disputes between trademark owners and domain name holders in which the Company has been named as a defendant. On March 20, 1997, PG Media, Inc., a New York-based corporation, filed a lawsuit (the "PG Media suit"), alleging that the Company had restricted access to the Internet by not adding PG Media's requested TLDs in violation of the Sherman Act. On October 17, 1997, a group of six plaintiffs filed a lawsuit (the "Thomas suit") against the Company and the NSF challenging the legality of fees defendants charge for the registration and renewal of domain names on the Internet and seeking restitution of fees collected from domain name registrants in an amount in excess of $100 million, damages, and injunc-

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> tive and other relief. The plaintiffs allege violations of the Administrative Procedures Act, the Independent Offices Appropriations Act, the Sherman Act and the U.S. Constitution. In each of these cases, the Company believes it has meritorious defenses and intends to defend itself vigorously. While the Company cannot reasonably estimate the potential impact of the claims advanced in the PG Media or Thomas suits, a successful claim against the Company in either of these proceedings could have a material adverse effect on the Company's business, financial condition and results of operations.
>
> In addition, on June 27, 1997, SAIC received a Civil Investigative Demand from the U.S. Department of Justice issued in connection with an investigation to determine whether there is, has been, or may be an antitrust violation under the Sherman Act relating to Internet registration products and services. The Company cannot reasonably estimate the potential impact of the investigation nor can it predict whether a civil action will ultimately be filed by the Department of Justice. The Company is unable to predict the form of relief that might be sought in such an action or that might be awarded by a court or imposed as a result of any settlement. Any such relief could have a material adverse effect on the Company's business, financial condition and results of operations.
>
> Litigation in which the Company is involved has resulted and likely will result in, and any future litigation can be expected to result in, substantial legal and other expenses to the Company and a diversion of the efforts of the Company's personnel.

SEC, *supra* note 5, at 23-29.

> ITEM 3. LEGAL PROCEEDINGS
>
> As of March 13, 1998, the Company was a defendant in 6 lawsuits involving domain name disputes between trademark owners and domain name holders. The Company is drawn into such disputes, in part, as a result of claims by trademark owners that the Company is legally required, upon request by a trademark owner, to terminate the right the Company granted to an alleged trademark infringer to register the domain name in question. Further, trademark owners have also alleged that the Company should be required to monitor future domain name registrations and reject registrations of domain names which are identical or similar to their federally registered trademark. The holders of the domain name registrations in dispute have, in turn, questioned the Company's right, absent a court order, to take any action which suspends their registration or use of the domain names in question. Although 42 out of approximately 3,600 of these situations have resulted in litigation involving the Company, as of March 13, 1998, no payments have been made by the Company to any plaintiff and only four of these cases are pending. The Company believes that it has meritorious defenses and intends to vigorously defend itself against these claims.
>
> On June 27, 1997, SAIC received a Civil Investigative Demand ("CID") from the U.S. Department of Justice ("DOJ") issued in connection with an investigation to determine whether there is, has been, or may be an antitrust violation under the Sherman Act relating to Internet regis-

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tration products and services. The CID seeks documents and information from SAIC and the Company relating to their Internet registration business. The Company cannot reasonably estimate the potential impact of the investigation nor can it predict whether a civil action will ultimately be filed by the DOJ. The Company is unable to predict the form of relief that might be sought in such an action or that might be awarded by a court or imposed as a result of any settlement. Any such relief could have a material adverse effect on the Company's business, financial condition and results of operations.

On March 20, 1997, PG Media, Inc., a New York-based corporation ("PG Media"), filed a lawsuit against the Company in the United States District Court, Southern District of New York alleging that the Company had restricted access to the Internet by not adding PG Media's requested TLDs in violation of the Sherman Act. In its complaint, PG Media has, in addition to requesting damages, asked that the Company be ordered to include reference to PG Media's TLDs and name servers in the root zone file administered by the Company under the Cooperative Agreement. The Company has answered the complaint, but no motions are pending. In addition, in June 1997, the Company received written direction from the NSF not to take any action to create additional TLDs or to add any new TLDs to the Internet root zone until the NSF provides further guidance. On September 17, 1997, PG Media filed a Second Amended Complaint adding the NSF as a defendant. The Company believes that it has meritorious defenses and intends to vigorously defend itself against the claims of PG Media. Although the Company cannot reasonably estimate the potential impact of such claims, a successful claim under the plaintiff's theory could have a material adverse effect on the Company's business, financial condition and results of operations.

On October 17, 1997, a group of six plaintiffs filed a lawsuit (the "Thomas suit") against the Company and the NSF in the United States District Court, District of Columbia, challenging the legality of fees defendants charge for the registration and renewal of domain names on the Internet and seeking restitution of fees collected from domain name registrants in an amount in excess of $100 million, damages, and injunctive and other relief. Plaintiffs originally alleged violations of the Competition in Contracting Act ("CICA"), the Sherman Act and the U.S. Constitution. Following the filing of motions to dismiss by the defendants, the plaintiffs filed an amended complaint on January 30, 1998, dropping the cause of action based upon CICA, but adding alleged violations of the Administrative Procedures Act and the Independent Offices Appropriations Act. The plaintiffs also filed a motion for preliminary injunctive relief against the NSF concerning the "Intellectual Infrastructure Fund." On February 2, 1998, the United States District Court, District of Columbia, issued an order granting the plaintiffs' motion for a preliminary injunction, enjoining the NSF from spending any of the money collected by the Company for the Intellectual Infrastructure Fund. On February 10, 1998, the plaintiffs filed a motion for preliminary injunction against the Company seeking several items of relief. On February 24, 1998, the Company and the NSF

> filed motions to dismiss the amended complaint. Also on February 24, the plaintiffs filed a motion for partial summary judgment concerning the Intellectual Infrastructure Fund. The plaintiffs' motion for preliminary injunction against the Company and partial summary judgment against the NSF, and both motions to dismiss were heard before the Court on March 17, 1998 and the Court has taken the matters under advisement. The Company believes that it has meritorious defenses and intends to vigorously defend itself against the claims in the Thomas suit. While the Company cannot reasonably estimate the potential impact of such claims, a successful claim under the plaintiffs' theories could have a material adverse effect on the Company's business, financial condition and results of operations.
>
> The Company is involved in various other investigations, claims and lawsuits arising in the normal conduct of its business, none of which, in the opinion of the Company's management, will have a material adverse effect on its financial position, results of operations, cash flows or its ability to conduct business.
>
> Litigation in which the Company is involved has resulted and likely will result in, and any future litigation can be expected to result in, substantial legal and other expenses to the Company and a diversion of the efforts of the Company's personnel. See "Item 1-Business-Risk Factors-Litigation.

SEC, *supra* note 5, at 33-34.

> The Company is a party in a number of legal proceedings. While the Company cannot reasonably estimate the potential impact of the claims advanced in the PG Media or Thomas suits, a successful claim against the Company in either of these proceedings could have a material adverse effect on the Company's business, financial condition and results of operation. In addition, while the Company cannot predict what relief, if any, might be sought, awarded or imposed as a result of any civil action filed by the Department of Justice arising from its investigation regarding Internet registration products and services, any such relief could have a material adverse effect on the Company's business, financial condition and results of operation. Moreover, litigation in which the Company is involved has resulted and likely will result in, and any future litigation can be expected to result in, substantial legal and other expenses to the Company and a diversion of the Company's personnel. See "Item 3-Legal Proceedings."

SEC, *supra* note 5, at 48-49.

> NOTE 14—COMMITMENTS AND CONTINGENCIES
>
> As of December 31, 1997, the Company was a defendant in 5 lawsuits involving domain name disputes between trademark owners and domain name holders. The Company is drawn into such disputes, in part, as a result of claims by trademark owners that the Company is legally required, upon request by a trademark owner, to terminate the right the Company granted to an alleged trademark infringer to register the domain name in question. Further, trademark owners have also alleged that the Company should be required to monitor future domain name registra-

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tions and reject registrations of domain names which are identical or similar to their federally registered trademark. The holders of the domain name registrations in dispute have, in turn, questioned the Company's right, absent a court order, to take any action which suspends their registration or use of the domain names in question. Although 41 of these objections have resulted in litigation involving the Company, as of December 31, 1997, no damages have been awarded against the Company to any plaintiff in the 36 cases that have been resolved. The Company believes that it has meritorious defenses and intends to vigorously defend itself against these claims.

On October 17, 1997, a group of six plaintiffs filed a lawsuit (the "Thomas suit") against the Company and the NSF in the United States District Court, District of Columbia, challenging the legality of fees defendants charge for the registration and renewal of domain names on the Internet and seeking restitution of fees collected from domain name registrants in an amount in excess of $100 million, damages, and injunctive and other relief. Plaintiffs originally alleged violations of the Competition in Contracting Act ("CICA"), the Sherman Act and the U.S. Constitution. Following the filing of motions to dismiss by the defendants, the plaintiffs filed an amended complaint on January 30, 1998, dropping the cause of action based upon CICA, but adding alleged violations of the Administrative Procedures Act and the Independent Offices Appropriations Act. The plaintiffs also filed a motion for preliminary injunctive relief against the NSF concerning the "Intellectual Infrastructure Fund." On February 2, 1998, the United States District Court, District of Columbia, issued an order granting the plaintiffs' motion for a preliminary injunction, enjoining the NSF from spending any of the money collected by the Company for the Intellectual Infrastructure Fund. The Company believes that it has meritorious defenses and intends to vigorously defend itself against the claims in the Thomas suit. While the Company cannot reasonably estimate the potential impact of such claims, a successful claim under the plaintiffs' theories could have a material adverse effect on the Company's business, financial condition and results of operations. See Note 15.

On June 27, 1997, SAIC received a Civil Investigative Demand ("CID") from the U.S. Department of Justice ("DOJ") issued in connection with an investigation to determine whether there is, has been, or may be an antitrust violation under the Sherman Act relating to Internet registration products and services. The CID seeks documents and information from SAIC and the Company relating to their Internet registration business. The Company cannot reasonably estimate the potential impact of the investigation nor can it predict whether a civil action will ultimately be filed by the DOJ. The Company is unable to predict the form of relief that might be sought in such an action or that might be awarded by a court or imposed as a result of any settlement. Any such relief could have a material adverse effect on the Company's business, financial condition and results of operations.

On March 20, 1997, PG Media, Inc., a New York-based corporation ("PG Media"), filed a lawsuit against the Company in the United States growth increases to 60,000,000[12] domain names, then the number of domain names in dispute could mushroom to 120,000, with 1200-1500 lawsuits to be defended against trademark holders—many of them with substantial resources. At an estimated risk of $ 1 million per lawsuit (one hundredth of the amount claimed in one then outstanding suit), $1.2 to $1.5 billion (if not billions more) of risk could be seen clouding the company's future, whether in mergers or acquisitions, and its financial statements.

Compounding its risks, by the end of 1997 or early 1998, NSI knew that the National Science Foundation would not renew the Cooperation Agreement. The National Science Foundation was examining a proposed rule to phase out the Cooperation Agreement as part of a privatization of the do-

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> District Court, Southern District of New York alleging that the Company had restricted access to the Internet by not adding PG Media's requested TLDs in violation of the Sherman Act. In its complaint, PG Media has, in addition to requesting damages, asked that the Company be ordered to include reference to PG Media's TLDs and name servers in the root zone file administered by the Company under the Cooperative Agreement. The Company has answered the complaint. In addition, in June 1997, the Company received written direction from the NSF not to take any action to create additional TLDs or to add any new TLDs to the Internet root zone until the NSF provides further guidance. On September 17, 1997, PG Media filed a Second Amended Complaint adding the NSF as a defendant. No motions are pending as of December 31, 1997. The Company believes that it has meritorious defenses and intends to vigorously defend itself against the claims of PG Media. Although the Company cannot reasonably estimate the potential impact of such claims, a successful claim under the plaintiff's theory could have a material adverse effect on the Company's business, financial condition and results of operations. The Company is involved in various other investigations, claims and lawsuits arising in the normal conduct of its business, none of which, in the opinion of the Company's management, will have a material adverse effect on its financial position, results of operations, cash flows or its ability to conduct business.

SEC, *supra* note 5, at 78-80.

[12] *Internet Domain Names & Intellectual Property Rights: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. (1999) (prepared testimony of Michael Daniels, Chairman of the Bd. of Directors, Network Solutions, Inc.), *available at* http://www.house-gov/judiciary/dani0728.htm [hereinafter Daniels Testimony].

main name registration scheme.[13] Given that NSI was assert

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[13] "The NSF has stated that it will not be re-awarding a cooperative agreement at the end of the flexibility period." SEC, *supra* note 5, at 11.

> The Proposed Rule provides that the U.S. government would phase out the Cooperative Agreement by the end of September 1998. In addition, the Proposed Rule provides that, as the U.S. government is seeking to end its role in the DNS, the provision in the Cooperative Agreement requiring allocation of 30% of the registration fee to the Internet Intellectual Infrastructure Fund should terminate on April 1, 1998, the beginning of the flexibility period. The Proposed Rule provides that the Company and the U.S. government would negotiate an agreement that should contain the following terms designed to promote competition in domain name registration: (1) the Company would effectively separate and maintain a clear division between its current "registry" and "registrar" functions; (2) the Company would continue to operate the .com, .org and .net registries and to act as a registrar for those TLDs, but other companies would be permitted to act as registrar for those TLDs; (3) the .edu TLD would be transferred to a not-for-profit entity; (4) the Company's registry would treat all registrars on a nondiscriminatory basis and price registry services according to an agreed upon formula for a period of time; (5) as part of the transition, the Company would develop (or license) and implement the technical capability to share the registrar functions in the .com, .org, and .net TLDs with competing registrars as soon as possible, by an agreed upon date; (6) the Company would provide the U.S. government with "a copy and documentation of all the data, software, and appropriate licenses to other intellectual property generated under the Cooperative Agreement, for use by the new corporation for the benefit of the Internet"; (7) the Company would turn over control of the A-root server and the management of the root server system when instructed to do so by the U.S. government; and (8) the Company would be required to meet the requirements, set forth in the Proposed Rule, for registrars and registries.
>
> The Proposed Rule also provides that as part of the transition, an agreement would need to be reached between the U.S. government and IANA on the transfer of IANA functions to the new corporation.
>
> The formal comment period for the Proposed Rule ended on March 23, 1998. The NTIA expresses in the Proposed Rule its hope that a reasonable consensus can be found and that, after appropriate modifications, implementation of a final rule can begin in April 1998. Numerous comments have been received on the Proposed Rule, including comments from the Company. Some of the comments are critical of certain of the Proposed Rule's provisions. The Commerce Department has indicated that a final rule will be issued shortly after review of the comments received. It is impossible to predict at this time whether or when a final rule will be issued and, if issued, the timing of its implementation, the exact nature of its provisions or of any terms negotiated by the U.S. government and the Company or the precise effect of such provisions or terms on the Company. In addition, any final rule that is issued or any negotiated

ing intellectual property rights[14] over the registry and regis-

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> terms could be challenged by persons or entities who disagree therewith. See "Risk Factors-Uncertainty of Internet Governance and Regulation."

SEC, *supra* note 5, at 13-14.

[14]

> 3. Technical Infrastructure Support. The Company is investing significant technical and financial resources to improve and to operate its domain name registration business. A substantial portion of the Company's software is custom-developed and proprietary. The Company's internally developed and proprietary software includes an automated registration capability that currently processes in excess of 90% of all new registration requests without human intervention. The Company believes that significant engineering talent is required to create a registration services capability and that knowledge of Internet domain name system ("DNS") structures, Internet security, data routing and routing protocols is critical to creating and enhancing registration service capabilities. The Company developed RWhois, a standard open protocol, which is used in the registration services business. The Company's engineering staff has significant expertise in the RWhois protocol. The Company believes that engineers skilled in protocol development are difficult to identify, hire and retain and thus its staff of engineers represents a valuable resource. See "Operations."
>
> The Company currently maintains in excess of one and one-half million unique second level domain name registrations. The Company has realized significant scale efficiencies throughout its registration process as a result of its large customer base and technical infrastructure.

SEC, *supra* note 5, at 8-9.

> Substantial portions of the Company's internally developed registration software have been custom-developed and are proprietary. The Company's internally developed registration software includes an automated registration capability that currently processes in excess of 90% of all new registration requests without human intervention."

SEC, *supra* note 5, at 17.

> INTELLECTUAL PROPERTY RIGHTS
>
> The Company's principal intellectual property consists of, and its success is dependent upon, the Company's proprietary software utilized in its registration service business and certain methodologies and technical expertise it utilizes in both the design and planned implementation of its current and future registration service and proposed Internet-enabling services businesses. Some of the software and protocols used by the Company in its registration service and proposed Internet-enabling businesses are in the public domain or are otherwise available to the Company's competitors. *The Company also has compiled a database of information relating to customers in its registration business. While a portion of this database is available to the public, the Company believes that it has certain ownership rights in this database and intends to protect such rights.* The Company's engineers have in-depth technical knowledge and unique

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> processes that are critical to the Company's consulting services business, in which a full range of consulting and systems integration services are offered in order to transition organizations from private, legacy networks to more scalable and efficient enterprise networks. The Company has no patents but its proprietary materials are protected by trade secret laws. The Company also has registered copyrights in certain of its proprietary software and the Company owns several trademarks. See "Risk Factors-Intellectual Property Rights.

SEC, *supra* note 5, at 19 (emphasis added).

> Intellectual Property Rights. If it were determined that the Company does not have ownership rights in its database of information relating to customers in its registration business or if the Company is unable to protect such rights in this database or is required to share the database with potential competitors, there could be a material adverse effect on the Company's business, financial condition and results of operations. The Proposed Rule would require the Company to provide the U.S. government with "a copy and documentation of all the data, software, and appropriate licenses to other intellectual property generated under the [C]ooperative [A]greement, for use by the new corporation for the benefit of the Internet." If certain of the Company's software and data generated which is proprietary to the Company were to be provided to the new corporation under the Proposed Rule and in turn provided to competing registries or registrars, the Company's business, financial condition and results of operations could be materially and adversely affected.
>
> The Company relies upon a combination of nondisclosure and other contractual arrangements with its employees and third parties and trade secret laws to protect its proprietary rights and limit the distribution of its proprietary information. There can be no assurance that the steps taken by the Company in this regard will be adequate to deter misappropriation of proprietary information or that the Company will be able to detect unauthorized use of its proprietary information and take appropriate steps to enforce its intellectual property rights. Furthermore, even if these steps are successful, there can be no assurance that others will not develop technologies that are similar or superior to the Company's proprietary technology. Although the Company believes that its services do not infringe on the intellectual property rights of others and that it has all rights necessary to utilize the intellectual property employed in its business, the Company is subject to the risk of claims alleging infringement of third party intellectual property rights. Any such claims could require the Company to spend significant sums in litigation, pay damages and develop non-infringing intellectual property or acquire licenses to the intellectual property that is the subject of asserted infringement. Failure by the Company to adequately protect its proprietary rights or litigation relating to intellectual property rights could have a material adverse effect on the Company's business, financial condition and results of operations.

SEC, *supra* note 5, at 27.

> International Operations. The Company's revenues from sources outside

trar, a clash with the National Science Foundation or future successor registrars and registries was a great risk.

Stratton D. Sclavos, Chairman of Verisign, Inc. ("Verisign" founded in 1995) was aware of these issues. He sat on the Board of Directors of NSI as of at least 1997. NSI and Verisign had begun to develop close ties due to the complementarity of their core registration (NSI) and digital (Verisign) certificates internet businesses.[15] Any uncertainty

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> the U.S. have increased significantly and may continue to increase in the future. As a result, the Company will increasingly be subject to the risks of conducting business internationally, including unexpected changes in regulatory requirements, fluctuations in the U.S. dollar, tariffs and other barriers and restrictions and the burdens of complying with a variety of foreign laws. In addition, the Company will increasingly be subject to general geo-political risks, such as political and economic instability and changes in diplomatic and trade relationships, in connection with its international operations. There can be no assurance that such regulatory, geopolitical and other factors will not adversely impact the Company's operations in the future or require the Company to modify its business practice. In addition, the laws of certain foreign countries may not protect the Company's proprietary rights to the same extent as do the laws of the United States.

SEC, *supra* note 5, at 31.

[15]

> Agreements with Internet-Based Product and Services Providers. The Company has entered into an agreement with VeriSign, Inc. ("VeriSign") pursuant to which the Company provides its customers with direct access to VeriSign's server security certificates through the Company's domain name registration process. The Company will receive a portion of VeriSign's subscription fees for providing such access to VeriSign subscribers. The Company may enter into other agreements designed to allow the Company to build upon its strategy of becoming an Internet-based business center where a business or individual can have access to companies which provide the enabling products and services to conduct business on the Internet.

SEC, *supra* note 5, at 16.

> Stratton Sclavos: Well, Paul, as you know I've been associated with Network Solutions for some time. And I've always believed that this is a very strong business model independently. And as we began to have discussions about strong partnering and about looking at registry services it became very obvious that the holistic combination together was the right path to go down.

Verisign, Rule 425 filing with the U.S. Securities & Exchange Commission (Mar. 7, 2000), *at* http://www.sec.gov/Archives/edgar/data/101447310001012870-00-001256.txt (last visited on Jan. 3, 2003).

for NSI would also cloud the future for both companies—a future that appeared to be bright if the companies worked together.

Thus, the future had to be managed aggressively to overcome the domain name dispute liability risk resulting from the then current U.S. law and NSI's domain name dispute policy, the risk of loss of the Cooperation Agreement by September 1998, the risk of a challenge to ownership of NSI's alleged intellectual property rights, and the risk to shareholder value if the development of NSI and Verisign's ties were thwarted. These risks went to the core of what NSI was about and thus it was essential to begin to exercise control over the environment.

B. ICANN, WIPO and NSI

At this time,[16] the United States Government, in a White Paper of June 5, 1998, among other things, asked the World Intellectual Property Organization to:

> (1) develop recommendations for a uniform approach to resolving trademark/domain name disputes involving cyberpiracy (as opposed to conflicts between trademarkholders with legitimate competing rights),
> (2) recommend a process for protecting famous trademarks in the generic top level domains, and
> (3) evaluate the effects, based on studies conducted by independent organizations, such as the National Research Council of the National Academy of Sciences, of adding new gTLDs and related dispute resolution procedures on trademark and intellectual property holders. These findings and recommendations could be submitted to the board of the new corporation for its consideration in conjunction with its development of registry and registrar policy and the creation and introduction of new gTLDs.[17]

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[16] I have not been able to find whether this was fortuitous or NSI instigated.

[17]

> Mr. Chairman and Members of the Committee,
> Thank you for this opportunity to present the results of the WIPO Internet Domain Name Process and some observations on the current situation with regard to the implementation of those results.

Mandate

The mandate for the involvement of the World Intellectual Property Organization (WIPO) in the process of the transition of the technical management of the domain name system (DNS) to a private corporation came originally from the USG White Paper of June 5, 1998, which contained the following passage:

"The U.S. Government will seek international support to call upon the World Intellectual Property Organization (WIPO) to initiate a balanced and transparent process, which includes the participation of trademark holders and members of the Internet community who are not trademark holders, to (1) develop recommendations for a uniform approach to resolving trademark/domain name disputes involving cyberpiracy (as opposed to conflicts between trademarkholders with legitimate competing rights), (2) recommend a process for protecting famous trademarks in the generic top level domains, and (3) evaluate the effects, based on studies conducted by independent organizations, such as the National Research Council of the National Academy of Sciences, of adding new gTLDs and related dispute resolution procedures on trademark and intellectual property holders. These findings and recommendations could be submitted to the board of the new corporation for its consideration in conjunction with its development of registry and registrar policy and the creation and introduction of new gTLDs."

The international support which the White Paper indicated that the U.S. Government would seek for the role of WIPO was manifested at the annual meeting of the Member States of WIPO, of which there are 171, in September 1998. At that meeting, the WIPO General Assembly endorsed the mandate and approved the undertaking of an international process designed to make the recommendations and to establish the findings called for in the White Paper.

The Process Undertaken by WIPO

The Process that WIPO conducted in response to the mandate conferred upon it was both intensive and extensive. It was intensive insofar as an endeavor was made to undertake and complete the Process within a very short timeframe. The Process was completed within nine months, the final report being published on April 30, 1999. This timeframe, it was considered, was necessitated both by the urgency of the problems being addressed, which were leading to a wasteful diversion of resources on the part of owners of intellectual property rights, and by the need to have available the results of the Process in time for the proposed introduction of competition in the provision of registration services in the generic top-level domains, .com, .net and .org.

The Process was extensive insofar as an endeavor was made to involve the widest cross-section of persons and entities interested in the administration of the DNS across the widest geographical area. To this end:

- a website (http://wipo2.wipo.int) was established for the Process and made available in three languages (English, French and Spanish); a total of 1,358 persons and organizations from 74 countries registered on the

ICANN emerged as the "new corporation" in 1998.[18] Thus, NSI had an interlocutor other than the National Science Foundation with whom it could address several of its issues (domain name dispute liability risk, the extension of the Cooperation Agreement risk). For legitimacy, ICANN needed NSI's support and, for its perennity, NSI needed an extension of its Cooperation Agreement. Without NSI's support, the U.S. Government faced the risk that NSI would take its alleged intellectual property, including the registry database, and attempt to "go it alone" in the internet domain name registration business. If such an effort were attempted to be blocked through litigation, in the hothouse atmosphere of Washington, D.C. politics, NSI's colorable claim to ownership of the intellectual property for the domain name system would likely be viewed as the Bush and/or Clinton Administration having "given away" the keys to the internet in a "sweetheart deal" to a minority owned corporation. Whether under a corporate welfare trope, racial politics trope, or Bush versus Clinton trope, the politics would be in-

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> website to receive communications concerning developments in the Process; 17 open meetings were held in 15 countries and five continents, which were attended by 1264 participants; three of those meetings were held in the U.S.A., two in Washington D.C. and one in San Francisco; the full audio and text records of all of the meetings were published and made available on the Process website; an unmoderated listserver, to which 420 persons subscribed, was established to facilitate the free discussion of the issues under consideration in the Process;
> - three Requests for Comments (RFCs) were issued in three languages, the first directed at the further definition of the issues specified in the original mandate, the second seeking substantive comments on those issues, and the third consisting of an interim report;
> - in all, comments on the RFCs and formal presentations at the open meetings were made by
> - 40 governments-4 international organizations-74 professional, industrial and academic organizations-181 corporations and law firms-183 individuals.

Internet Domain Names and Intellectual Property Rights: Hearings Before the Subcomm. on Courts and Intellectual Property in the Judiciary, 106th Cong. (1999) (prepared testimony of Francis Gurry, Assistant Director General & Legal Counsel to WIPO), *available at* http://www.house.gov/judiciary/gurro728.htm [hereinafter Gurry Testimony].

[18] Announcement, ICANN Executes Agreement with U.S. Government (November 25, 1998), *available at* www.icann.org/announcements/.

cendiary.

On the other hand, without an agreement on favorable terms or with even some defacto control of ICANN, NSI's future was in jeopardy. As part of its efforts, NSI needed to significantly manage, if not control, the World Intellectual Property Organization Domain Name Process to put in place a domain name dispute policy that was appropriate for NSI's needs. At the same time, if agreement could be forged with ICANN and WIPO a joint effort to find a legislative solution to reduce or eliminate NSI's legal risk (as well as ICANN and WIPO's potential legal risk) in the domain name dispute business under the current U.S. law was a potential joint favorable outcome for the three entities.

The Cooperation Agreement was ultimately signed between NSI, ICANN and the U.S. Department of Commerce in November 1999.[19] The Cooperation agreement extended NSI's hegemony over the registry for .com, .net and .org gTLD's for at least four years—eons on the Internet.[20] It further extended NSI's role as a registrar for an additional four years and possibly eight years, permitted other registrars but required them to participate in a Shared Registration System operated by NSI and pay a fee per domain name registration to NSI, and substantially bound ICANN to very carefully take into account NSI's prerogatives.[21] In return, ICANN received recognition, cooperation and some money from NSI for the near term.[22]

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[19] Announcement, ICANN, DoC (Department of Commerce), NSI Announce Tentative Agreements (Sept. 28, 1999), *available at* www.icann.org/announcements/; Announcement, Preliminary Report on the Annual Meeting of the ICANN Board in Los Angeles (November 4, 1999) (Nov. 5, 1999), *available at* www.icann.org/announcements/.

[20] NSI Cooperation Agreement *at* http://www.icann.org/asi/asi-registry-agreement.htm (last visited Jan. 4, 2003).

[21] *Id.*

[22] *Id.* Further changes to the registry agreement were made in April 2001 by which the one existing registry agreement would be divided into separate registry agreements for each of .com, .net and .org, and each would be subject to an individual term. *Id.* The .org agreement would expire on December 31, 2002, and (NSI now merged into) VeriSign would not be eligible to seek to renew it. *Id.* The .org registry would then be turned over to an as yet unspecified not-for-profit organization. *Id.* The .net agreement would expire on January 1, 2006, and it would then be subject to a competitive renewal process in which VeriSign and all

As regards the WIPO Domain Name Process, NSI made sure that Philip Sbarbaro, its outside Chief Litigation Counsel, who had represented NSI in numerous trademark—domain name disputes, served on the expert panel making the report.[23] WIPO's worldwide process was complete on April 30, 1999, and submitted to ICANN's Board.[24] In addition, NSI and other testbed and post-testbed registrars met with WIPO at least on June 27, 1999 to hammer out an interim uniform dispute resolution policy.[25]

Having a favorable UDRP policy was of critical interest for NSI to reduce its domain name dispute risk in its core business. Having NSI's support was of critical interest to WIPO as NSI had 3600 and rising potential domain name cases that WIPO as dispute resolution service provider would have a chance to administer.[26] Since 1994, WIPO had created an Arbitration and Mediation Center and various alternative dispute resolution rules. While WIPO had developed a prestigious consulting board for the center, built close contacts with major, established arbitral and other dispute resolution institutions around the world, had been consulted on nominations or arbitrators, and had been actively participating in the work of the International Adhoc Committee on domain name disputes for several years, after five years of work WIPO did not have any cases in its docket. Having NSI's support of the UDRP policy elaborated through the WIPO Process would help WIPO to be named by ICANN as a dispute resolution service provider and help WIPO get access to NSI's disputes. More broadly, as part of the long term strategy of WIPO, the UDRP played a key role

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other interested parties could participate. *Id.* The .com agreement would expire on November 10, 2007, and VeriSign would have a right at that time to renewal for a new four-year term if it satisfies the criteria set forth in the agreement. *Id.* Thus, Verisign's hegemony over .net were for a further three years for a total of seven years and over .com for a further four years for a total of eight years with the possibility of renewal for a further four years out until 2010. Announcement, ICANN Announces Decision on Registry Agreement for .com/.net/.org domains (Apr. 2, 2001), *available at* www.icann.org/announcements.

[23] Daniels Testimony, *supra* note 12.

[24] Gurry Testimony, *supra* note 17.

[25] Gurry Testimony, *supra* note 17.

[26] Daniels Testimony, *supra* note 12.

in it maintaining and enhancing its institutional role in intellectual property protection worldwide. The UDRP was only part of a suite of digital objectives of WIPO.[27]

After the WIPO worldwide process, ICANN's Board adopted the UDRP on August 26, 1999. The implementation documents for the Board adopted policy were to be prepared by ICANN's staff. The staff noted that "In its August 26 resolutions, the Board indicated that implementation documents for an interim voluntary policy prepared by a group of ICANN-accredited registrars and Network Solutions, Inc and presented at the ICANN meeting in Santiago should be used as the starting point in drafting implementation documents for the Board-adopted policy."[28]

Thus, NSI as represented:

> (1) in the expert panel in the WIPO official process to create the UDRP policy, (2) in the WIPO registrar process to create a voluntary interim policy, (3) and through the incorporation of that effort in the ICANN staff process

was able to play a significant and possibly determinant role in the shaping of the UDRP. ICANN implemented the UDRP on November 29, 1999 and named WIPO as the first of four dispute resolution service providers under the policy.[29]

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[27] See WIPO Digital Agenda, *at* http://ecommerce.wipo.int/agenda/index.html (last viewed on Jan. 3, 2003). As a footnote, as I sat at a September 14 to 16, 1999 WIPO International Conference on Electronic Commerce and Intellectual Property at which WIPO's digital agenda was released, there was a session with the several international agencies—WIPO, the United Nations Commission on International Trade Law (UNCITRAL), the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD) and the International Telecommunications Union (ITU). As the speakers made their presentations, I thought that I was being informed along with the other four hundred paying participants how the Internet had been divided and roles assigned among the international agencies. UNCITRAL was to provide "plug in" laws that would permit countries to make digital-friendly their existing legal framework to help spur electronic commerce worldwide. The ITU would provide standards for hardware and software for communications to assure harmonization and interoperability. WIPO would meet all dispute resolution needs of the Internet. Where public international disputes arose, the WTO would provide the mechanisms of arbitrage. The "odd man out" appeared to be the OECD which was carving out all aspects of consumer protection on the Internet. This consumer protection area could touch upon all the areas of the other agencies and so that may have been the reason I thought I felt a palpable tension among the others with regard to the role the OECD was asserting it would play.

[28] Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy, Sept. 29, 1999, *at* http://www.icann.org/udrp/staff-report-29sept99.htm.

The remaining concern for the future of NSI was U.S. law. NSI along with WIPO, ICANN and organizations of trademark holders testified before the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property on July 28, 1999 in favor of the Anticybersquatting Consumer Protection Act (ACPA). NSI made a compelling case for its need for relief from liability for domain name disputes between alleged trademark holders and domain name holders or alleged cybersquatters. In a carefully worded statement, NSI's Chairman stated to the committee:

> Other than legislation, ADR presents the best hope, and Network Solutions intends to join with other registrars to develop a system, a solution that works. Whether these changes should be supported by legislative action is for the Members of the Committee to decide.[30]

The effort was a success and, in November 1999, Congress enacted the ACPA amending the Lanham Act.[31] Under the ACPA, domain name registrars who take appropriate remedial action in response to bad faith domain registrations are not required to grant monetary relief to the trademark holders. Proper remedial action includes refusing to register, removing from registration, transferring, temporarily disabling or permanently canceling a domain name: (i) in compliance with a court order; or (ii) in the implementation of a reasonable policy by the registrar, registry or other authority prohibiting registration of a domain name identical to, confusingly similar to or dilutive of another person's registered mark.[32]

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[29] Uniform Domain Name Dispute Resolution Policy, *at* http://www.icann.org/udrp/ (last viewed on Jan. 3, 2003). Eresolution.com discontinued taking cases filed after November 30, 2001 (and shortly thereafter went bankrupt) and the Asian Domain Name Dispute Resolution Centre (a joint venture of the Chinese International Economic and Trade Arbitration Commission and the Hong Kong International Arbitration Centre) was added on February 28, 2002. *Id.*

[30] Daniels Testimony, *supra* note 12.

[31] *See* 15 U.S.C. § 1125(d) (2001).

Thus, as of November 30, 1999, NSI had: (1) successfully managed to get an extension of the Cooperation Agreement that maintained its hegemony over the registry for .com, .net, and .org for at least for four years, (2) put in place a favorable ICANN UDRP to be administered by WIPO with whom it had developed and enhanced a close working relationship, and (3)—working with trademark holders, ICANN and WIPO—had managed to get Congress to enact the ACPA which eliminated monetary liability even if NSI was sued (provided it put in place a policy such as the ICANN UDRP that it had been instrumental in designing). By any estimation, this was a stunning success as compared to the situation a year earlier.

The way appeared clear for the further solidifying of NSI's relationship with Verisign. A further risk remained, however, as to how the panelists who would actually decide the cases would approach the issues they had to address. Notwithstanding the efforts deployed by NSI, there was the risk that the UDRP would fail as trademark holders might not resort to it and, if resorted to, panels would take a restrictive or moderate approach to deciding the cases that were submitted. Panelists could routinely decline jurisdiction, for example, saying the matter was too complex for the UDRP leaving only a few clear cut cases to be resolved under the UDRP. At this point, Verisign, whose Chairman sat on the Board of NSI, could assist NSI.

C. Verisign and TZMM

Since at least 1996 (to this day), Verisign used as an outside counsel TZMM, a Palo Alto law firm.[33] In September

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[32] 15 U.S.C. § 1114(2)(D)(ii); F. LAWRENCE STREET & MARK P. GRANT, LAW OF THE INTERNET § 4.02(5)(e), at 4-18 (2002).

[33] A list of clients including the Verisign logo are available at the tzmm website http://www.tzmm.com/frames/fclients.htm (last viewed on Jan. 3, 2003). Verisign related deal announcements at the website http://www.tzmm.com/news.htm (last viewed on Jan. 3, 2003) are "Verisign, Inc. Secures Financing From 10 Major Internet Business Companies" (Dec. 6, 1996); "Verisign IPO" (Feb. 5, 1998); Verisign to Provide Security for Nationsbank's

1998, M. Scott Donahey was appointed Special Counsel at TZMM (later to become a partner) where he works to this day.[34] On August 25, 1999 (i.e. the day before ICANN approved the UDRP), M. Scott Donahey was named to WIPO's panel of neutrals.[35] He was named as a neutral in the UDRP panels of other subsequent UDRP dispute resolution service providers (NAF, CPR and Eresolution).[36] At Eresolution, he further joined its board of directors on June 15, 2000.[37] Mr. Donahey was a key speaker at the WIPO International Conference on Electronic Commerce and Intellectual Property of September 14-16, 1999 in Geneva. At a dinner party after the first night, a question was asked "Will ICANN work?". Mr. Donahey said something like "Yes, it has to work for so many people." Given this background, for someone who had been at that dinner party, it did not come as a surprise that when WIPO had the first UDRP case introduced in December 1999, Mr. Donahey was appointed as the single panelist to resolve the dispute.[38]

Internet Communications" (Mar. 8, 1998); "Agreement Combines Verisign Digital Certificate Solution with Verifone's End-to-End Internet Payment Suite" (Apr. 28, 1998); "Lotus and Verisign Join Forces to Provide Secure Global Communitations" (May 26, 1998); "Visa & Verisign Partner to Deliver E-Commerce Services to Web Merchants" (July 9, 1999); "Verisign and Dun & Bradstreet Form Alliance to Enhance Online Commerce Security" (Nov. 10, 1999).

[34] "Tomlinson Zisko Morosoli & Maser LLP Adds Prominent Intellectual Property and Patent Attorney Scott Donahey Joins Firm as Special Counsel" (Sept. 8, 1998), *at* http://www.tzmm.com/news.htm. "TZMM Elevates Four New Parnters" (Jan. 27, 2000) (announcing M. Scott Donahey and others were made partners). *Id.*

[35] "M. Scott Donahey Named to World Intellectual Property Organization's (WIPO) Panel of Neutrals" (Aug. 25, 1999). *at* http://www.tzmm.com/news.htm.

[36] In doing a search at www.udrpinfo.com on Mr. Donahey's name, one finds that he has been named a panelist in proceedings by CPR, Eresolution, NAF and WIPO. His resume is listed among the CPR, NAF and WIPO panelists at their respective websites. Eresolution is now defunct so it is no longer possible to access their website but as he has been named a panelist in Eresolution cases he was a member of their list.

[37] Scott Donahey Becomes a Member of Eresolution's Board of Directors (June 15, 2000) *at* http://www.tzmm.com/news.htm.

[38] See search for M. Scott Donahey at www.udrpinfo.com (last viewed on Jan. 3, 2003); *see also List of Proceedings Arranged by Commencement Date, at* http://www.icann.org/udrp/ (last viewed on Jan. 3, 2003).

D. *Recapitulating*

NSI had a vital stake in avoiding domain name disputes that would affect its core registry and registrar business. Verisign's Chairman has sat on the Board of NSI since at least 1997. TZMM has served as outside counsel to Verisign since at least 1996. Mr. Donahey was appointed Special Counsel of TZMM in 1998 and went on to be named a panelist by all four dispute resolution service providers who implemented the ICANN UDRP. Donahey was also appointed in the first case concerning a domain name that sat in the registry of NSI.

III. THE TAINT

A. *Donahey*

It is my contention that the NSI to Chairman of Verisign/Board Member of NSI to Verisign to TZMM to Donahey connection is a direct financial connection between NSI and Donahey. Donahey's decision in the first UDRP case had a direct impact on NSI's business even though NSI was not present as a party to the first case. NSI's financial risk arises from alleged trademark holders instituting legal action over domain names for which NSI is registrar (or receives funds from other ICANN-accredited registrars as part of the Shared Registration System) and which sit in NSI's allegedly proprietary registry. NSI has an interest in alleged trademark holders filing cases in the UDRP and using this to avoid lawsuits being filed by them against NSI. As an instrument and possibly an instrumentality of NSI, Donahey has an interest in trademark holders receiving a favorable result in each case he decides. Those favorable results would encourage trademark holders to use the policy thus limiting NSI's liability. Donahey made no disclosure of this interest in the first case nor in any of his subsequent cases.

As noted in *Schmidt v. Zilvetti*,[39]

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[39] 20 F.3d 1043, 1047 (9th Cir. 1994), *reprinted in* THOMAS CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 526 (2d ed. 2000).

> In a non-disclosure case, the integrity of the process by which arbitrators are chose is at issue. Showing a 'reasonable impression of partiality' is sufficient in a non-disclosure case because the policy of [Federal Arbitration Act] section 10(a)(2) instructs that parties should choose their arbitrators intelligently . . . the parties can choose their arbitrators intelligently only when facts showing potential partiality are disclosed.

Moreover, the principles pronounced in *Commonwealth Coatings Corporation v. Continental Casualty Co.* focused on the need to avoid the appearance of bias:

> We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias . . . . This rule of arbitration and this canon of judicial ethics (note: both seeking disclosure) rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.[40]

Absent a disclosure, it appears difficult to see how the complainant or, particularly the respondent, could be assured of the integrity of the UDRP process. Even if there were disclosure, it is my contention that this type of interest is "direct definite and capable of demonstration rather than remote, uncertain or speculative."[41] Donahey has "a personal interest in the proceedings, whether pecuniary or otherwise, which would have biased his or her judgment in the proceedings."[42]

Even if the position is taken that the UDRP is considered non-binding[43] or that the UDRP is not arbitration,[44] the concerns about the integrity of the process in the above cases under the U.S. Federal Arbitration Act would appear to be essential, particularly in a new procedure like the UDRP, of a new organization like ICANN, and provided through relatively new dispute resolution service providers such as WIPO, NAF,

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[40] Commonwealth Coatings Corp v. Continental Casualty Co., 393 U.S. 145, 149-50 (1968).

[41] Hayne, Miller & Farni, Inc. v. Flume 888 F. Supp. 949, 953-54 (E.D. Wisc. 1995) (quoting Tamari v. Bache Halsey Stuart, Inc., 619 F.2d 1196, 1200 (7th Cir. 1980), *reprinted in* CARBONNEAU, *supra* note 39, at 526.

[42] Austin South 1, Ltd. v. Barton-Malow Co., 799 F. Supp. 1135, 1142 (M.D. Fla. 1992) *reprinted in* CARBONNEAU, *supra* note 39, at 526.

[43] The UDRP states it is non-binding but that is not enough. As demonstrated in the recent case of *Sallen v. Corinthians Licenciamentos* where the First Circuit Court of Appeals reversed the lower court and concluded that initiation of pro-

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ceedings in district court stayed the WIPO panel's order to transfer the domain name. Sallen v. Corinthians Licenciamentos, 273 F.3d 14, 16 (1st Cir. 2001), *available at* www.adrworld.com. Transfer after dismissal of the district court case, but during appeal was possibly wrongful since a domain name registrant whose name is suspended in an extrajudicial dispute resolution procedure can seek a declaratory judgment that his use of the name was, in fact, lawful under the Anti Cybersquatting Consumer Protection Act (ACPA). *Sallen*, 273 F.2d at 16. A lower court took the view that the domain holder who lost under the UDRP did not have a right to seek a declaratory judgment under the ACPA. *Id.* In other words, the UDRP would have been binding and final notwithstanding its language. Fortunately, the Court of Appeals reversed based on its own interpretation of the ACPA. *Id.* at 30. However, this problem highlights the concern that is beyond the object of this paper that the UDRP can become binding if the local law does not give a redress to the losing party—particularly the respondent who has the domain name transferred and is alleged not to have any trademark rights.

[44] BroadBridge Media L.L.C. v. Hypercd.com, 106 F. Supp. 2d 505, 508-09 (S.D.N.Y. 2000) (concluding that a plaintiff who has filed an ICANN administration proceeding may, before, during, and after filing such a proceeding, bring an action in federal court); Weber-Stephen Products Co. v. Armitage Hardware and Building Supply, Inc., No. 00 C 1738, 2000 WL 562470, at *2 (N.D. Ill. May 3, 2000) (concluding that the ICANN policy and its accompanying rules do contemplate the possibility of parallel proceedings in federal court and that federal courts are not bound by the outcome of the ICANN administrative proceedings); Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona, 189 F. Supp. 2d 367, 371 (E.D. Va. 2002) (panel ruling should be given no weight and the case decided based on the evidence presented before the court, Spanish trademark is valid for purposes of the ACPA); *Sallen*, 273 F.3d at 16 (concluding that initiation of proceedings in district court stayed the WIPO panel's order to transfer the domain name). Transfer after dismissal of district court case but during appeal was possibly wrongful, a domain name registrant whose name is suspended in an extra-judicial dispute resolution procedure can seek a declaratory judgment that his use of the name was, in fact, lawful under the Anti Cybersquatting Consumer Protection Act. *Id.* Parisi v. Netlearning, 139 F. Supp 2d 745, 746 (E.D. Va. 2001) (concluding that UDRP proceedings should not receive the significant deference accorded to arbitration under the Federal Arbitration Act). Even if the UDRP is non-binding arbitration, impartiality (including the concept of independence) of the panelist should be expected. Compare, for example, the Texas Alternative Dispute Resolution Act (Alternative Dispute Resolution Procedures, TEX. CIV. PRAC. & REM. § 154.027 (2001), *available at* http://www.texasadr.org/adract.cfm (last viewed on Jan. 3, 2003) (Nonbinding arbitration is a forum in which each party and counsel for the party present the position of the party before an *impartial third party*, who renders a specific award.") (emphasis added).

Eresolution and CPR. Additionally, the providers place emphasis on providing independent panelists.[45] Moreover, concerns about disclosure are not peculiar to the United States, but form a common theme in arbitration statutes[46] and rules around the world and a declaration of independence is even required under the UDRP. Even in mediation, it is axiomatic that having the neutral reveal any potential interests is central to maintaining confidence in the integrity of the process.[47]

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[45] "The outcome of all domain name cases is decided by independent panelists, appointed by WIPO." Press Release, *supra* note 3.

[46] *See* Article 12 of the UNCITRAL Model Law on Arbitration:

> (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. (2) An arbitrator, from the rime of his appointment and throughout the arbitral proceedings, shall without delay disclose in writing to the parties any such circumstances referred to in sub-section (1) unless they have already been informed of them by him. (3) An arbitrator may be challenged only if . . . circumstances exist that give rise to justifiable doubts as to his impartiality or independence.

Reprinted in CARBONNEAU *supra* note 39, at 804.

Int'l Bar Ass'n Ethics for Int'l Arbitrators, art. 2.1 ("A prospective arbitrator shall accept an appointment only if he is fully satisfied that he is able to discharge his duties without bias.").

> The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises where an arbitrator favors one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.

Int'l Bar Ass'n, *supra* at 4.1

> A prospective arbitrator should disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence. Failure to make such disclosure creates an appearance of bias, and may by itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification.

Reprinted in CARBONNEAU, *supra* note 39, at 838-39. C. Civ. art. 14 (Fr.) Article 1452 ("The arbitrator who thinks that there may be a ground for his disqualification must inform the parties of it. In such circumstances, he can accept his terms of reference only with the agreement of the parties") *reprinted in* CARBONNEAU, *supra* note 39, at 942; 1996 United Kingdom Act § 24(1) "A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator) apply to the court to remove an arbitrator on any of the following grounds (a) that circumstances exist that give rise to justifiable doubts as to his impartiality;" *reprinted in* CARBONNEAU, *supra* note 39, at 971; American Arbitration Assocation, Int'l Arbitration Rules, art. 7, "1. Arbitrators acting under these rules shall be impartial and independent. Prior to accepting appointment, a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence." *reprinted in* CARBONNEAU, *supra* note 39, at 1063; Int'l Chamber of Commerce, Rules of Arbitration, art. 7:

Since that first case, Donahey has served as a panelist in 111 cases of the 4,333 decisions rendered up to February 18,

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> 1. Every arbitrator must be and remain independent of the parties involved in the arbitration. 2. Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. 3. An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature which may arise during the arbitration.

Reprinted in CARBONNEAU, *supra* note 39, at 1081; London Court of Int'l Arbitration Rules, art. 5.2

> All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party . . . 5.3 Before appointment by the LCIA Court, each arbitrator shall furnish to the Registrar a written resume of his past and present professional positions; . . . and he shall sign a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration. Each arbitrator shall thereby also assume a continuing duty forthwith to disclose any such circumstances to the LCIA Court, to any other members of the Court, to any other members of the Arbitral Tribunal and to all the parties if such circumstances should arise after the date of such declaration and before the arbitration is concluded.

Reprinted in CARBONNEAU, *supra* note 39, at 1111-12.

[47] TEX. CIV. PRAC. & REM., *supra* note 44, § 154.023(a) ("Mediation is a forum in which *an impartial person, the mediator*, facilitates communication between parties to promote reconciliation, settlement, or understanding among them") (emphasis added); *see also*, Int'l Chamber of Commerce ADR Rules, art. 3.2 (in force as from July 1, 2001):

> Every prospective Neutral shall promptly provide ICC with a *curriculum vitae* and a statement of independence, both duly signed and dated. The prospective Neutral shall disclose to ICC in the statement of independence any facts or circumstances which might be of such nature as to call into question his or her independence in the eyes of the parties. ICC shall provide such information to the parties in writing.

The need for disclosure has most recently been highlighted for the Online Dispute Resolution (ODR) area in particular through the draft final report and recommendations of the American Bar Association Task Force on E-commerce and Alternative Dispute Resolution (I serve as Assistant Reporter). *See* www.law.washington.edu/ABA-eADR (last viewed on Jan. 4, 2003).

2002, or 2.56 percent of all cases decided.[48] Given the interest of one panelist in nearly three percent of the cases alone, it is my contention that the UDRP is compromised at its core. Given the further influence of NSI and NSI through Donahey, I am of the view that it is an international scam.

B. Further influence

In addition to serving in these cases, Donahey has provided a chronicle on all UDRP decisions to help influence analysis of the cases and interpretation of the cases. The cases on which he has served are used as illustrations and/or precedents in other cases in his own cases and in other cases on which he is not serving. In turn, those other cases are cited in still other cases. Like ripples on a lake or an oil spill on the sea, the taint spreads throughout the UDRP decisions. Moreover, ICANN has formed a task force to review the UDRP.[49] Mr. Donahey serves on that task force upon proposal of CPR.

He is also in the position to influence, on NSI's behalf, the further evolution of the UDRP. The UDRP and variants of it are being implemented in other TLD's such as the "internationalized" and non-ASCII script domain names, to the new gTLD's (aero, .biz, .coop, .info, .museum, .name, .pro) and to twenty-three of the 243 country code Top Level Domains (ccTLD's).[50] In addition, for keyword type disputes, a variant of the UDRP has been instituted. Finally, the UDRP has been looked to as a model or precursor for still new forms of dispute resolution described as shrinkwrap arbitration. Tainted UDRP decisions risk influencing the evolution of these systems and compromising them.

A final concern is that there are new registrars and new registries being approved by ICANN for gTLD's and by respective national authorities for ccTLD's. Because the interests demonstrated in this paper of NSI in the UDRP proceedings, I am concerned that through panelists other than Mr. Donahey, similar interests of NSI, other registries, and other registrars are going undisclosed by panelists to the detriment of the integrity of still other UDRP or UDRP-type decisions. The difficulty is in the ability to find evidence of that, and though I am not aware of any, I felt this is an area of research that would be merited to help develop a complete picture of influence in the UDRP panelists by the registrars and registries. My instinct tells me that the problem is not unique to Mr. Donahey, but is systemic given the brazenness of the NSI approach here.

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[48] *See* list generated for panelist M. Scott Donahey *at* http://www.udrpinfo.com (last viewed on Jan. 4, 2003).

[49] Some of the areas: (1) as under consideration are: (1) more defenses and issues than originally covered by the UDRP, (2) broader authority over new types of Internet disputes, (3) an appeal process within the UDRP to a panel of 3, and (4) arbitrator disqualification criteria. *See* Carmody, *supra* note 4.

[50] Press Release, *supra* note 3.

IV. A NEW INTERNET POWERHOUSE

NSI and Verisign announced a merger on March 8, 2000 by which Verisign bought NSI for $21 Billion.[51] Through its efforts, NSI was able to reduce or eliminate its risks to permit it to make the appropriate representations and warranties that would allow the merger to go forward.[52] A new Internet pow-

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[51] The valuation was based on the closing share prices the day before the announcement on March 7, 2000. Verisign 8-K filing with the U.S. Securities & Exchange Commission (March 8, 2000), *available at* http://www.sec.gov/Archives/edgar/data/1014473/0001012870-00-001253.txt (last viewed on Jan. 4, 2003).

[52] Verisign purchased NSI in March 2000.
Agreement and Plan of Merger by and among VeriSign, Inc., Nickel Acquisition Corporation and Network Solutions, Inc., 14-17 (2000), *available at* http://www.sec.gov/Archives/edgar/data/1014473/0001012870-00-001253 (last viewed on Jan. 4, 2003):

> Article II Representations and Warranties of Company
> "2.9 Intellectual Property. For the purposes of this Agreement, the following terms have the following definitions: "Intellectual Property" shall mean any or all of the following and all rights in, arising out of, or associated therewith: (i) all United States, international and foreign patents and applications therefor and all reissues, divisions, renewals, extensions, provisionals, continuations and continuations-in-part thereof; (ii) all inventions (whether patentable or not), invention disclosures, improvements, trade secrets, proprietary information, know how, technology, technical data and customer lists, and all documentation relating to any of the foregoing; (iii) all copyrights, copyrights registrations and applications therefor, and all other rights corresponding thereto throughout the world; (iv) all industrial designs and any registrations and applications therefor throughout the world; (v) all trade names, URLs, logos, common law

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trademarks and service marks, trademark and service mark registrations and applications therefor throughout the world; (vi) all databases and data collections and all rights therein throughout the world; (vii) all moral and economic rights of authors and inventors, however denominated, throughout the world, and (viii) any similar or equivalent rights to any of the foregoing anywhere in the world.

"Company Intellectual Property" shall mean any Intellectual Property that is owned by, or exclusively licensed to, Company or one of its subsidiaries.

"Registered Intellectual Property" means all United States, international and foreign: (i) patents and patent applications (including provisional applications); (ii) registered trademarks, applications to register trademarks, intent-to-use applications, or other registrations or applications related to trademarks; (iii) registered copyrights and applications for copyright registration; and (iv) any other Intellectual Property that is the subject of an application, certificate, filing, registration or other document issued, filed with, or recorded by any Governmental Entity.

"Company Registered Intellectual Property" means all of the Registered Intellectual Property owned by, or filed in the name of, Company or one of its subsidiaries.

(a) No material Company Intellectual Property or product or service of Company is subject to any proceeding or outstanding decree, order, judgment, agreement, or stipulation restricting in any manner the use, transfer, or licensing thereof by Company, or which may affect the validity, use or enforceability of such Company Intellectual Property.

(b) Each material item of Company Registered Intellectual Property is valid and subsisting, all necessary registration, maintenance and renewal fees currently due in connection with such Registered Intellectual Property have been made and all necessary documents, recordations and certificates in connection with such Registered Intellectual Property have been filed with the relevant patent, copyright, trademark or other authorities in the United States or foreign jurisdictions, as the case may be, for the purposes of maintaining such Registered Intellectual Property, except, in each case, as would not materially adversely affect such item of Company Registered Intellectual Property.

(c) Company or one of its subsidiaries owns and has good and exclusive title to, or has license (sufficient for the conduct of its business as currently conducted) to, each material item of Company Intellectual Property free and clear of any Encumbrance (excluding licenses and related restrictions).

(d) Neither Company has nor any of its subsidiaries transferred ownership of, or granted any exclusive license with respect to, any Intellectual Property that is or was material Company Intellectual Property, to any third party.

(e) Part 2.9(e) of the Company Disclosure Letter lists (i) all material contracts, licenses, agreements to which Company is a party with respect to Company's authority as a registry and registrar for Internet general top level domains including but not limited to the .com, .net and .org domains, (ii) all Internet distribution and advertising agreements to which Company is a party (except for any agreement which, if terminated, would not have a Material Adverse Effect on Company), and (iii) all contracts, licenses and agreements to which Company is a party pursuant to which a third party has licensed or transferred any material Intellectual Property to Company (except for any contract, license and agreement which, if terminated, would not have a Material Adverse Effect on Company). There are no material contracts, licenses and agreements to which Company is a party with respect to the software, hardware, network and technology infrastructure used in Company's business as currently conducted which, if terminated, would have a Material Adverse Effect on Company.

(f) To Company's knowledge, the operation of the business of Company as such business currently is conducted, including Company's design, development, marketing and sale of the products or services of Company (including with respect to products currently under development) has not and does not infringe or misappropriate the Intellectual Property of any third party or, to its knowledge, constitute unfair competition or trade practices under the laws of any jurisdiction.

(g) Company has not received notice from any third party that the operation of the business of Company or any act, product or service of Company, infringes or misappropriates the Intellectual Property of any third party or constitutes unfair competition or trade practices under the laws of any jurisdiction, which allegation, if true, would have a Material Adverse Effect on Company.

(h) Except as set forth in Part 2.9(h) of the Company Disclosure Letter, to the knowledge of Company, no person has or is infringing or misappropriating any Company Intellectual Property, which infringement or misappropriation, individually or in the aggregate, would have a Material Adverse Effect on Company.

(i) Company and its subsidiaries have taken reasonable steps to protect Company's and its subsidiaries' rights in Company's and such subsidiaries' confidential information and trade secrets, except where the failure to do so would have a Material Adverse Effect on Company.

(j) None of the Company Intellectual Property or product or service of Company contains any defect in connection with processing data containing dates in leap years or in the year 2000 or any preceding or following years, which defects, individually or in the aggregate, would have a Material Adverse Effect on Company.

(k) Company has obtained requisite authority, governmental approvals and rights (sufficient for the conduct of its business as currently conducted) to act as the exclusive registry and a non-exclusive registrar for certain general Internet top level domains, including but not limited to the .com, .net and .org domains. The Company Disclosure Letter lists all material contracts, licenses and agreements to which Company is a party with respect to Company's authority and obligations as a registry and registrar for Internet general top level domains including but not limited to the .com, .net and .org domains.

(l) All material contracts, licenses and agreements relating to erhouse was created. Thanks to the risk reduction efforts, the new powerhouse does not report any concerns about thousands of domain name disputes occurring as NSI did in 1998.[53]

Company's authority and obligations as a registry and registrar for Internet general top level domains including but not limited to the .com, .net and .org domains, are in full force and effect. The consummation of the transactions contemplated by this Agreement will neither violate nor result in the breach, modification, cancellation, termination, or suspension of such contracts, licenses and agreements. Company and each of its subsidiaries are in material compliance with, and have not materially breached any term of any of such contracts, licenses and agreements and, to the knowledge of Company and its subsidiaries, all other parties to such contracts, licenses and agreements are in compliance in all material respects with, and have not materially breached any term of, such contracts, licenses and agreements.

(m) Since November 10, 1999, Company has received no notice from any United States Governmental Entity or ICANN (i) of any material complaint by a United States Governmental Entity or ICANN regarding Company's services or activities related to its role as a registry and registrar for Internet general top level domains including but not limited to the .com, .net and .org domains; or (ii) questioning Company's authority to act as the exclusive registry and a non-exclusive registrar for Internet general top level domains, including but not limited to the .com, .net and .org domains.

(n) To the Company's knowledge, as of the date of this Agreement, Company's separation of its registrar and registry computer systems was achieved without a material failure, which, for purposes of this Section 2.9(n), shall be defined as uptime availability of less than 99% since the date of the separation of such systems due to the separation of such systems.

* * *

"2.11 Litigation. There are no claims, suits, actions or proceedings pending or, to the knowledge of Company, threatened against, relating to or affecting Company or any of its subsidiaries, before any Governmental Entity or any arbitrator that seeks to restrain or enjoin the consummation of the transactions contemplated by this Agreement or which could reasonably be expected, either singularly or in the aggregate with all such claims, actions or proceedings, to have a Material Adverse Effect on Company or on the Surviving Corporation following the Merger or have a material adverse effect on the ability of the parties hereto to consummate the Merger. No director or executive officer of Company has asserted a claim to seek indemnification from Company under the Company Charter Documents or any indemnification agreement between Company and such person.

[53] The Department of Justice ("DOJ") Antitrust Division issued a Civil In-

The head of NSI/Verisign saw no need for ICANN's approval of the merger.[54] As one example of its new relative power to

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> vestigative Demand ("CID"), seeking information and documents concerning the then pending acquisition by VeriSign of THAWTE. VeriSign has complied with the information requests of the CID, and has provided additional information to the DOJ to alleviate their concerns about the potential competitive effects of the transaction. While management believes that the transaction does not violate the antitrust laws, it is possible that the DOJ may ultimately raise an objection. Formal objection could lead to further proceedings or litigation that could have an adverse material effect on VeriSign, and could include the licensing or divestiture of assets acquired in the transaction.
>
> VeriSign is engaged in other complaints, lawsuits and investigations arising in the ordinary course of business. VeriSign believes that it has adequate legal defenses and that the ultimate outcome of these actions will not have a material effect on VeriSign's consolidated financial position and results of operations.

Verisign 10-K filing with the U.S. Securities & Exchange Commission Notes to Consolidated Financial Statements 83 n.8 (Dec. 31, 2000, 1999 & 1998), *available at* http://www.sec.gov/Archives/edgar/data/1014473/000101287001001360/0001012870-01-001360-0001.txt (last viewed on Jan. 4, 2003). No mention is made of potential domain name disputes.

[54] Verisign explains regulatory approvals to analysts in an analyst phone on March 7, 2000.

> Ed Kressler [an analyst on the analyst phone call]: Great. In terms of-you mentioned Hart-Scott-Rodino, what other sort of regulatory approvals or approvals or conditions are pursuant to this deal?
>
> Stratton Sclavos [Chairman of Verisign]: Certainly we'll be talking to the Department of Commerce and, you know, with the S4 filing with the SEC and just getting all that information straight. You know, on the registry business, Network Solutions has a cooperative agreement with the Department of Commerce and with ICANN. And so while this is not a true requirement to assign any contract because it's a reverse triangular merger, in fact, you know, we certainly want to make sure that we're very upfront with all the departments and we gain their support.
>
> Jim Rutt [then Chairman of NSI has since left the company]: And we communicated with the Department of Commerce yesterday and with ICANN this morning. And we're reasonable confident at this point that people look favorably upon this transaction.
>
> Ed Kressler: Okay, and then I'm sorry, I'm—slightly ((inaudible)) here. The Department of Commerce and then this ICANN, they're just large contracts that you have that don't require necessarily approval but just sort aren't going to matter for the business going forward?
>
> Stratton Sclavos: Right, that's right.
>
> Ed Kressler: Terrific. Great, thanks very much.

Verisign, Inc., Strategic Special Announcement Conference Call, Mar. 7, 2000 7:00 a.m. CT, Moderator: Stratton Sclavos, Chairman of Verisign, *available at* http://www.sec.gov/Archives/edgar/data/1014473/0001012870-00-001256.txt (last viewed

ICANN, on August 24, 2000, NSI/Verisign opened up a Multilingual Domain Name Testbed for non-English character sets in .com, .net, and .org in Japanese, Korean, Chinese (traditional and simplified), and soon thereafter to be in Spanish, Portuguese and Arabic. On August 25, 2000, ICANN could only say that it will monitor closely the implementation of non-English language character sets by NSI Registry.[55] As NSI did when it was the lone registrar and registry, NSI/Verisign takes the position that they have ownership rights in the Shared Registration System that permits all domain names in .com, .net and

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on Jan. 4, 2003).

[55] Announcement, ICANN Comment on NSI Registry Multilingual Domain Name Testbed (Aug. 25, 2000), *available at* http://www.icann.org/announcements/ (last viewed on Jan. 4, 2003).

.org to be submitted to NSI/Verisign's registry.[56]

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[56] Verisign takes position that it owns the Shared Registration System:

> Domain Name Registration Services. Through our registrar services we register second-level domain names in the .com, .net and .org top-level domains, enabling individuals, companies and organizations to establish a unique identity on the Internet. Our customers apply to register second-level domain names either directly through our web sites and e-mail-based registration templates or indirectly through Internet access providers and others. We accept registrations and re-registrations in one-year increments for periods up to ten years.
>
> Country Code and Secondary Market Name Services. Through our idNames services, we have continued to expand our domain name registration services to the country code top-level domains. We provide search and registration services for domain names in country code top-level domains around the world.

Verisign 10-k, *supra* note 53, at 3.

> Global Registry Services
>
> Domain Name Registry Services. We are the exclusive registry of domain names within the .com, .net and .org global top-level domains under agreements with ICANN and the Department of Commerce, or "DOC." As a registry, we maintain the master directory of all second level domain names in the .com, .net and .org top-level domains. *We own and maintain the shared registration system that allows all registrars, including our own, to enter new second-level domain names into the master directory and to submit modifications, transfers, re-registrations and deletions for existing second-level domain names.*

Verisign 10-k filing, *supra* note 53, at 7 (emphasis added). "Through an outsourcing agreement with the operator of the .tv top-level domain, we also provide domain name registry services for the .tv country code. Under this agreement, we provide registry infrastructure support that includes the use of our proprietary shared registry system for registrars of .tv." Verisign 10-k filing, *supra* note 53, at 7.

> Competition in Web Presence Services. We currently face competition among registrars within a single top level domain like .com, and in the future face competition among registrars within all new top level domains. As of February 28, 2001, there were over 140 ICANN-accredited registrars, including us, America Online, BulkRegister.com, CORE or "Council of Internet Registrars," Deutsche Telekom, France Telecom/Transpac, iDirections, Internet Domain Registars, interQ Incorporated, Melbourne IT, NameSecure.com, NetBenefit, PSINet, Register.com, Tucows.com, Inc., Talk.com and Verio. As of February 28, 2001, our shared registration system was being used by 77 accredited registrars, in addition to us, in the .com, .net and .org top level domains to register second level domain names. We also face competition from third level domain name providers such as Internet access providers and registrars of top level domains other than those top level domains for which we act as exclusive registry. Although we currently act as the exclusive registry for second level domain names within the .com, .net and .org top level

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> domains, we face competition from registries of country code top level domains and from new top level domains. The process to introduce new top level domains is currently in progress. On November 16, 2000, ICANN announced its selections for registry operators for seven new top level domains. The applicants selected for further negotiation are the following: .aero—Societe Internationale de Telecommunications Aeronautiques SC; .biz—JVTeam, LLC; .coop—National Cooperative Business Association; .info—Afilias, LLC; .museum—Museum Domain Management Association; .name—Global Name Registry, Ltd; and .pro—RegistryPro, Ltd. As a result, we could have additional competition.

Verisign 10-k filing, *supra* note 53, at 7.

> Currently, the technical structure of the Internet only permits one registry for each top-level domain. A registrar acts as the interface between the registry and the end-user domain name registrants. Registrars submit to the registry certain limited information for each of their customers that has a second-level domain name in a given top level domain. A registrar can provide value-added products and services in addition to its basic registration service. Numerous registrars are able to operate within each top-level domain. We currently are the exclusive registry in the .com, .net and .org top-level domains and the leading registrar in those domains.
>
> On November 10, 1999, a series of wide-ranging agreements were entered into. These agreements include the following: . a registry agreement between us and ICANN under which we will continue to act as the exclusive registry for the .com, .net and .org top level domains for at least four years from that date; . a revised registrar accreditation agreement between ICANN and all registrars registering names in the .com, .net and .org domains; . a revised registrar license and agreement between us as registry and all registrars registering names in the .com, .net and .org domains using our proprietary shared registration system; . an amendment to the cooperative agreement; and . an amendment to the MOU.
>
> Under these agreements we have: (i) recognized ICANN as the not-for-profit corporation described in amendment 11 to the cooperative agreement, (ii) become an ICANN-accredited registrar and (iii) agreed to operate the registry in accordance with the provisions of the registry agreement and the consensus policies established by ICANN in accordance with the terms of that agreement. These agreements provide that we will be an accredited registrar through November 9, 2004 with a right to renew indefinitely in accordance with the agreement.

Verisign 10-k filing, *supra* note 53, at 12-13.

> *With regard to our domain name registration services, our principal intellectual property consists of, and our success is dependent upon, our proprietary software used in our registration service business and certain methodologies and technical expertise we use in both the design and implementation of our current and future registration services and Internet-based products and services businesses. We own our proprietary shared registration system through which competing registrars, including our registrar, submit .com, .net and .org second-level domain name registrations. Some of the software and protocols we use in our registration services are in the*

NSI/Verisign is a visible participant in the new .info gTLD owned and managed by Afilias.[57] It seems reasonable to expect that Afilias will follow NSI/Verisign's cues in its dealings with ICANN and that the other new registries and registrars will also follow suit. With the addition of Verisign's digital certificate business, NSI/Verisign's potential chokepoints in the life cycle of business websites who are customers for the other registrars and registries is enhanced in every country on the planet.[58] Thus, when ICANN seeks to negotiate new contracts

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> *public domain or are otherwise available to our competitors. We also have compiled a database of information relating to customers in our registration business. While a portion of this database is available to the public in the form of a directory service, we believe that we have certain ownership rights in this database, and we intend to protect these rights.*
>
> From time to time, we have received, and may receive in the future, notice of claims of infringement of other parties' proprietary rights. Infringement or other claims could be asserted or prosecuted against us in the future, and it is possible that past or future assertions or prosecutions could harm our business. Any such claims, with or without merit, could be time-consuming, result in costly litigation and diversion of technical and management personnel, cause delays in the release of new Internet-based trust services or require us to develop non-infringing technology or enter into royalty or licensing agreements. Royalty or licensing agreements, if required, may not be available on terms acceptable to us, or at all. In the event of a successful claim of infringement against us and our failure or inability to develop non-infringing technology or license the infringed or similar technology on a timely basis, our business could be materially harmed.

Verisign 10-k filing, *supra* note 53, at 15 (emphasis added).

> In June 2000, we acquired Network Solutions, Inc., a publicly traded company that provides Internet domain name registration and global registry services for aggregate consideration of approximately $19.6 billion. Network Solutions expanded VeriSign's product and service offerings through the addition of the leading domain name registrar and the exclusive registry of domain names within the .com, .net and .org global top-level domain names. The acquisition of Network Solutions is a key component of VeriSign's vision of expanding our service offerings for the Internet infrastructure.

Verisign 10-k filing, *supra* note 53, at 12-13.

[57] *See* Afilias Global Registry Services, *at* http://www.afilias.com (last visited Jan. 5, 2003).

[58] In a March 7, 2000 conference call, Verisign chairman Stratton Sclavos said:

> Now as many of you know we describe our corporate mission as providing the trust services that make e-commerce work. We plan to do this for

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> every transaction, every communication, everywhere around the world.
>
> * * *
>
> Again, Verisign is announcing today that we'll be acquiring Network Solutions. We believe it creates a global Internet infrastructure leader who can provide the critical life-cycle services for every e-business, from the time they get on and get a domain name through their establishing of a commercial presence all the way through simple e-commerce and on to global trading.
>
> * * *
>
> They were the first mover in domain registration. We were the first mover in digital authentication and global public key infrastructures.
>
> They're the exclusive Internet registry. And they provide the DNS infrastructure. Verisign has been a unique technology imbedded in key Internet applications like browsers that makes our services ubiquitous.
>
> * * *
>
> We think there's an increasing value proposition. Customers can start with us now at $35 per year for their Web identity and move up the food-chain through things like commercial presence and Web site creation at $300 per year on average to simple e-commerce where we may be seeing $1000 per year per entity, to customer and supply-chain management that could generate anywhere from $50,000 to $200,000 per year or more as these environments take off.
>
> * * *
>
> Many people are asking, why this combination now? Well I think both companies and our boards felt that the Internet and e-commerce growth is accelerating and that the biggest opportunity is still in front of us. We also both have seen that customers are demanding integrated services. They want service providers to do managed services for them and to provide turnkey one-stop shopping for a broad range of services that can help them roll out their e-business initiatives.
>
> We also believe we have an ability right now to establish the lifetime customer relationship from Web identity, which is a hugely sticky proposition, all the way out through employee, customer and buyer and seller identity credentials.

Verisign, Inc., Strategic Special Announcement Conference Call, *supra* note 54.

In addition, a further chokepoint for businesses for Verisign is through www.truste.org. Consumer privacy complaint offline dispute resolution is foreseen for licensees in the Truste EU-US Safe Harbor Program. http://www.truste.org/programs/pub_harbor_join.html (last viewed on Feb. 3, 2003). Through a declaration to the U.S. Department of Commerce, licensees such as Microsoft Corporation foresee Truste's dispute resolution procedure for consumer privacy disputes as part of their compliance with the EU-US Safe Harbor Framework. This framework was created as a result of the European Commission's Directive on Data Protection which went into effect in October 1998. http://web.ita.doc.gov/safeharbor/shlist.nsf/5624e34187d9c4dc85256960005fc648/0fe0d3d9a40a570485256a7a006d8084!OpenDocument (last viewed on June 25, 2002). In addition to a representative of Microsoft (discussion of that topic is beyond the scope of this article), Verisign's Chief Policy Officer (apparently since February or extensions with NSI/Verisign, it appears to be facing a more formidable negotiating partner. At the same time, ICANN itself is going through a significant identity crisis at the date of this writing.[59] Whether ICANN fails, through domain name dispute risk reduction, contract extension, merger, and control into the panels of the UDRP, NSI/Verisign has positioned itself to survive.

V. THE TRUE MEANING OF THE UDRP FAILURE—THE WATSON-EDSTROM CONUNDRUM

This paper has demonstrated the NSI-Verisign-TZMM-Donahey chain of interest that taints ICANN's UDRP. In addition, it has demonstrated the key roles that chain, ICANN and WIPO have played in creating the UDRP and creating new U.S. law through the ACPA—forming a ring of substantial influence: a ring of power to rule them all. I have been confronted with other situations of power like this. When confronted with these situations, I have felt compelled to make reference to a particular paradox I call the Watson-Edstrom Conundrum.

I find myself led back to two men—Thomas Watson of IBM and J. Sigfrid Edstrom, a Swedish industrialist—and how they conducted themselves during the Holocaust. I have tried to get around these thoughts, but have nevertheless felt the need to explain what drives my thinking—to explain what is behind any ideas I might put forward. In the summer of 2001, Ms. Saba Wainapel, a friend and Holocaust survivor, gave me the key.[60]

2000 or three months after the UDRP came into being) sits on the Board of Directors of Truste–the organization that would evaluate consumer complaints against businesses and potentially withdraw Truste certification for purposes of the EU-US Safe Harbor Framework or Truste the more general Truste certification. (www.truste.org/about/truste/about_boa.html and www.truste.org/about/truste/about_cochetti.html (last viewed on June 25, 2002).

[59] Announcement, ICANN President Recommends a Roadmap for Reform (Feb. 24, 2002), *available at* http://www.icann.org/announcements/ (last viewed on Jan. 5, 2003); Announcement, ICANN Staff Draft: Toward a Statement of the ICANN Mission (Mar. 7, 2002), *available at* http://www.icann.org/announcements/ (last viewed on Jan. 5, 2003).

[60] Saba encouraged me to read her late husband's book, *From Death Row to*

Such thoughts underlie my perception of the ADR arena in which I have worked and written over the past fifteen years and color my approach to the topic of this paper. As I look at the various providers or would-be providers of the UDRP or ADR and at the above stated entities in the ring of power, I wonder "are they like Watson or are they like Edstrom?" For it is in the words and deeds of these men—Watson as President of the International Chamber of Commerce (ICC) from 1937-1938 and Edstrom as President from 1939-1944—that I see the seeds of all that can be good, and conversely, what can be bad in how we create the future of ADR.

For me, Watson and Edstrom define the range of possibilities—from unacceptable to admirable—for an institution involved in creating international best business practices and dispute resolution. In such institutions, the tension for each of us personally is to determine whether we are on the side of the angels (Edstrom)—of humanity's progress—or whether we are in fact hindering that progress (Watson).

A. 1937

My first encounter with Watson and Edstrom was in 1994[61] when my then boss at the ICC International Court of Arbitration showed me some pictures from the 1937 ICC Berlin Congress archives.[62] As has recently been noted, Watson was named President of the ICC in 1937 and had lobbied hard to hold that Congress in Berlin.[63] The pictures accompanying the

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Freedom, which describes their lives growing up in Poland and in the concentration camps as nurse and doctor, wife (becoming a bride in order to voluntarily join her husband in the camp) and husband. The book helped me see true courage in the face of the worst kinds of human conduct. I dedicate this article to Saba and her late husband, Dr. David Wainapel. I hope that it measures up to what she should rightly expect from anyone who invokes her husband's words and pictures. *See* D. WAINAPEL, FROM DEATH ROW TO FREEDOM (1984).

[61] I had been at ICC International Court of Arbitration since 1986.

[62] I was researching the pre-World War II work of the ICC in preparation of a speech I was to give in Estonia. Estonia had been a member of the ICC before it fell into the then Soviet bloc.

[63] EDWIN BLACK, IBM AND THE HOLOCAUST 128 (2001).

recital of what went on shocked me—Watson and Hitler in a close discussion, Goering in full dress military regalia welcoming a dazzling couple of "masters of the (then) universe," the enormous Nazi flags festooning the walls of the Congress hall with the royal box in the first balcony where Hitler could sit and watch the activities.[64] From the tone of the photos, it was clear to me that in those settings the profoundly racist Nazi policies in place since 1933 and the plight of the Jews would not have been on the agenda.

This is not what you want to see after working at a place eight years. I felt compelled to explore the role of the ICC during the war. I was aware of the Wallenberg family's key role in ICC history, less well known than the heroic work of Raoul Wallenberg saving Jews, but that was not the ICC itself. I had heard that arbitrations between companies from Allied countries and from Axis countries had occurred. That did not seem to be unusual given the variety of trade directions and possible partners to be found in international arbitration at any one time, as well as the duty of an institution to act as a neutral in cases presented to it. In any event, the content of those arbitral decisions was not available in the reports of meetings in the 1939-1944 period that I was studying.

As I read about the war years, I was struck by the actions of J. Sigfrid Edstrom, President of ICC from 1939-1944 after Watson. Edstrom's work in moving the headquarters from Occupied Paris to Stockholm and preserving the organization was described in the archives with such heartfelt admiration that the emotion of those years jumped off of the pages. I gleaned from the archives that he was what might best be described as a good, decent man who did the right thing by the organization in that difficult period. He came to balance, in my opinion, the evil emanating from the 1937 Congress pictures and, by extension, his predecessor's presidency. Watson-Edstrom formed a pair—yin and yang, the two-faced Ogun in

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[64] *Id.* at 132-33. Black appears to describe the pictures I had seen. For those who think 1937 was "too early to know," I recommend Victor Klemperer's *I Will Bear Witness: A Diary of the Nazi Years 1933-1941* (1998) and *I Will Bear Witness: A Diary of the Nazi Years 1942-1945* (1999). *See also* HANS J. MASSAQUOI, DESTINED TO WITNESS: GROWING UP BLACK IN NAZI GERMANY (1999).

Yoruba tradition, two sides of the same coin—one way leading to good and the other to evil.

B. 1997

I would not have referred to these issues on July 2, 1999, my farewell from the ICC, if not for more recent events. At the end of 1996, I was appointed a director and thus became a member of the senior management of ICC. Soon after acceding to his office in January 1997, the new Swiss President of ICC[65] invited the senior management as well as the new Lebanese Vice-President[66] to lunch at the Plaza Athenee Hotel on Avenue Montaigne in Paris near ICC Headquarters. This was at the time of some of the most heated aspects of revelations and litigation concerning Nazi gold and/or dormant accounts of Holocaust victims in Swiss banks, with great pressure being placed on Switzerland.[67]

As we began the lunch, the ICC President made an emotional comment on the litigation and the dormant accounts situation. He said things like the Jews were stirring up things, bringing anti-Semitism on themselves. He took the view that everyone had acted badly during the Nazi years and there was no need to look back at what his company had or had not done during that time. This went on for some time and I felt that he had crossed the line. I felt like I had turned on a radio and accidentally come across a Hitler-era speech.

At my first lunch at the highest levels of private international relations, almost 60 years to the day of the 1937 ICC Berlin Congress, I was appalled by what I was hearing from the President and baffled by why he was doing this. As I sat in those splendid surroundings, I thought of all the suffering that had occurred and resolved that I could not just remain silent. I raised my hand to get the President's attention. I started to say something, but the Secretary General cut me off.

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[65] Helmut O. Maucher, then Chairman of Nestle.

[66] Adnan Kassar, then Chairman and Chief Executive Officer of Fransabank Group.

[67] Two articles noted in the latter half of 1996 were Barry James, *A Clamor to Return Nazi Booty to Holocaust Victims*, Sept. 12, 1996, *available at* http://www.iht.com/IHT/BJ/96/bj091296a.html ("The revelation in Britain that Switzerland may have held onto billions of dollars worth of German gold after World War II provided fresh ammunition Wednesday for organizations still seeking compensation for victims of the Nazi Holocaust and their heirs."); Barry James, *A Final Settlement for 7 Tons of Nazi Gold*, INT'L HERALD TRIB., Oct. 28, 1996, *available at* http://www.iht.com/IHT/BJ/96/bj102896.html ("With its reputation for financial probity under attack, Switzerland has set up five official inquiries to look into claims. The Foreign Ministry said last week that any funds discovered would be distributed according to ethical as well as legal criteria.").

At one point, the Vice-President concurred with the President.[68] Rather abruptly and shortly thereafter, the President ended his long comment with a curious phrase: "But what do I know!" as if to end by rejecting what he had been saying. He then passed to other matters.

I was in a dilemma. It appeared the President might be playing some type of sophisticated game with his Vice-President, or the President might sincerely believe his stated views. He was possibly trying to solicit an emotional reaction from us—a type of test for the Directors. But none of the Directors said anything at all in reaction to the offensive comments. I concluded that some kind of "mind game" was being played. Nevertheless, I felt the need to make some kind of dissenting comment on what had been said. But the problem was how to formulate it.[69]

An idea came to me to recast the atmosphere completely—bend reality to my will. So, at an appropriate silence in the conversation, I asked the President a multi-faceted and ambiguous question, "do you have fun doing your job?"[70] He looked at me curiously and, after a pause, said something like, "because of the terrible things I have to do, I have to find ways to have fun."

At the time, I felt proud of myself for having done something—anything—to react and for having shown modest courage. I thought I had kept faith with those who had suffered and died in the Holocaust.[71] Of course, with hindsight, I had to acknowledge the painful inadequacy of that mild act.

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[68] I discounted the Vice-President's concurrence as I felt it was most likely the product of animosity growing out of the tense Lebanese and Israeli relations. (I wonder now if that was the right thing to do.) I could not, however, find any excuse (education, background, lack of contact, class, race, gender, nationality, religion or whatever) for the President.

[69] My wife has told me that I should just have walked out.

[70] I think my sub-texts to the President were, "Do you really believe that nonsense you just said?" and/or "Were you enjoying our silence?" and/or "I saw that you were able to pull a concurrence out of your Vice-President, was that your goal?"

In contrast to that abysmal scene, I have had other experiences in the same organization where it was clear that an attempt was being made to improve the lot of humanity. Whether in the seminars in Paris and around the world, working on computerizing the case management system, in the Gaudet day publication,[72] or during discussion of very tough international commercial arbitration cases at the ICC International Court sessions, I felt that the spirit was being uplifted. Putting it another way, I recognized that sometimes I was in the presence of Watson and sometimes I was in the presence of Edstrom—thus the birth of the Watson-Edstrom Conundrum.

C. The Watson-Edstrom Conundrum

The Conundrum is this: in the sphere of international business best practices and dispute resolution at its highest levels, although words of progress may be used in public, in other public fora and privately, more retrograde views, deeds and objectives may be revealed and promoted. Thus, one needs an almost hyper-real vigilance to understand carefully what is occurring to determine whether what is being said and done is in fact progress—whether one is regressing with Watson or progressing with Edstrom.[73]

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[71] When I returned to work several Directors looked uncomfortable about what they had witnessed but, even then, did not dare speak. I then recognized that this type of silence and passivity may be the price expected to be paid when one is at a senior level.

[72] *See* ICC, IMPROVING INTERNATIONAL ARBITRATION: THE NEED FOR SPEED, LIBER AMICORUM MICHEL GAUDET (1998) (capturing some of the spirit of that remarkable day). President Gaudet has since written me saying that the spirit in the room that day was the same spirit he found when he first went to work with Jean Monnet constructing the European Community in the 1950's. It is the spirit he has felt present when progress is being made.

[73] Thus I doubt one can design the UDRP and ADR systems based on models that rely even slightly on the presumption of benign system administrators (I doubt if there are any), a neutral and defined law, or relinquishment of sovereignty. The struggle is far more Darwinian. *Cf.* Robert C. Bordone, *Electronic*

Sophisticated persons may find this unremarkable and laugh at my naïveté. They might posit that this is human nature so one should not make much ado about it. Yet, from watching those who have done good works in this area, I have come to believe that the arena of international business best practices and dispute resolution is special. It solicits our best selves while tempting our worst selves through access to power—particularly transnational power. At best (and rather extraordinarily, through private means), it gives substance to notions of good faith and fairness and proffers mechanisms that will help mankind as a whole move ahead economically and socially. At worst, it does not rise above narrow self-interest. In seeing parallels between the words and deeds sixty years ago and those of today, it was brought home to me that what happened sixty years ago could happen again today. It became clear that solace could not be found simply by working in this exalted arena. Struggle and vigilance remain essential to make sure that one's effort does indeed contribute to progress.

Struggle and vigilance remain essential for the UDRP—as if life depended on it. As it stands now, the UDRP is an international scam and more than cosmetic changes are needed to begin to restore or—possibly more accurately—create a process that disputants and courts will find has integrity. Our trust has been betrayed. While there are other issues that can be examined about the UDRP,[74] I submit we must first stop this

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Online Dispute Resolution: A Systems Approach—Potential, Problems, and a Proposal, 3 HARV. NEGOT. L. REV. 175 (Spring 1998).

[74] Some issues beyond the scope of this paper are: (1) whether consumer protection rules of the Brussels Regulation invalidate the UDRP clause of the registration agreement for European Union consumers as a restriction on the access to justice; (2) the contours of the direct beneficiary relationship of the registry/registrar with the domain name registrant and third party beneficiary relationship of the registry/registrar with the intended potential complainant through the domain name registration agreement; (3) the contours of the third party beneficiary relationship for the registry/registrar with the parties to the dispute once a complaint is filed; (4) comparison of results under the UDRP and national laws; (5) UDRP criteria as non-law (or merely negotiated law) and their interaction with laws selected by the panelists; (6) a new colonialism?: the international projection of US law and US courts through the UDRP in conjunction with the ACPA (Professor Xuan-Thao Nguyen drew my attention to the ACPA portion of this); (7) UDRP as an attack on strict consumer protection; (8) UDRP criteria and

"magouille planetaire."

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the UNIDROIT Principles—differences of degree or fundamental differences in nature; (9) the legal effect of the registration agreement and UDRP waivers of liability on registry/registrar liability; (10) independent alternative dispute resolution in marketplaces—tensions for the common alternative dispute resolution service provider between owner/member and/or member/member disputes; and (11) The Glass Bead Game—internet alternative dispute resolution as a multi-tiered Darwinian struggle. No doubt there are more.

COMMENT

"If Gold Rust"[1]: The Clergy Child Abuse Scandal Demonstrates the Need for Limits to the Church Autonomy Doctrine

I. CHILD ABUSE AND CHURCHES

> The church is catholic, universal, so are all her actions; All that she does belongs to all. When she baptizes a child, that action concerns me, for that child is thereby connected to that head which is my head too, and ingrafted into that body, whereof I am a member . . . . All mankind is of one author and is one volume . . . . No man is an island, entire of itself; every man is a piece of the continent, a part of the main.[2]

Twelve-year-old Patrick's father lost his bout with alcoholism when he committed suicide in 1986.[3] Soon afterwards,

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[1] "That if gold rust, what then will iron do?" GEOFFREY CHAUCER, THE CANTERBURY TALES 30 (Nevill Coghill trans., Penguin Books 1963). Chaucer used the metaphor of gold to describe priests and the metaphor of iron to describe the average man in order to set forth his concern that if priests are not good, then what can be expected of mankind. *See id.* Thus, Chaucer apparently felt that a priest should be above reproach. *See id.*

[2] John Donne, *Meditation XVII*, *in* THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 1214-15 (M. H. Abrams ed., 3d ed. 1974). Donne was an author and minister during the English Renaissance period. *Id.* at 1180. In *Meditation XVII*, Donne explains that all of mankind is inter-connected and that when a child is baptized into the church, he becomes the responsibility of every member of the church. *See id.* at 1214-15.

[3] THE INVESTIGATIVE STAFF OF THE *BOSTON GLOBE*, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH 82 (2002).

Father John J. Geoghan, a priest with a large, "welcoming" smile, came to his family's apartment in a housing project to offer consolation and to take Patrick to get ice cream.[4] On their way home, the priest molested the boy.[5] Patrick "froze up" and stared out the window in confusion, as the ice cream slowly melted down his arm.[6] When Patrick returned home, his mother asked him what was bothering him, but he was unable to answer for he "didn't know how to tell anyone something like that."[7] He still remembers the confusion that he felt and the way his arm felt sticky from the melted ice cream.[8]

After he had reached adulthood, Patrick McSorley learned that Cardinal Bernard Law had known at least as early September of 1984, that former priest John J. Geoghan had been molesting children.[9] However, Geoghan was not removed from the priesthood until 1998.[10] McSorley sued Cardinal Law and other church officials in early 2001 for the negligent hiring and retention of Geoghan.[11]

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[4] *Id.* at 11, 82. Former priest John J. Geoghan has admitted that he preferred boys from low income families because they were more affectionate toward him than children from wealthier families. *Id.* at 6, 19. Also, he often sought out children being raised by a single mother because these women were usually happy for their sons to have a father-figure. *Id.* at 6.

[5] *Id.* at 82. For a more graphic description of former priest John J. Geoghan's assault on Patrick McSorley, see *id.* at 82-83. Taking a boy out to get ice cream and helping him say his prayers while tucking him into bed at night were two of Geoghan's commonly-used tactics for getting a child away from other adults and gaining his trust. See *id.* at 19-23 for the disturbing stories of Geoghan's abuse of the three Mueller children and the seven Dussourd children, allegations that were known to the Boston Archdiocese prior to McSorley's abuse.

[6] *Id.* at 82-83. Patrick later explained that he was old enough to understand that the molestation was wrong, but the fact that the perpetrator was a priest "set off a whole wave of confusion." *Id.* at 83. Patrick has battled alcoholism and depression as a result of the traumatic experience. *Id.*

[7] *Id.* Patrick kept the abuse a secret until 1999. *Id.*

[8] THE INVESTIGATIVE STAFF OF THE *BOSTON GLOBE*, *supra* note 3, at 83. Now Patrick is very over-protective of his three-year-old son because "[i]f a priest can molest a little boy, anything can happen." *Id.* at 83-84.

[9] Michael Paulson, *Law Added to Suits Against Ex-Priest*, BOSTON GLOBE, Jan. 30, 2001, at B2. Soon after he arrived in Boston in 1984, Cardinal Law received a letter from a concerned mother informing him that Geoghan had molested boys in the past and had been sent for treatment, but that he had recently been seen dropping boys off at their houses late in the evening. THE INVESTIGATIVE STAFF OF THE *BOSTON GLOBE*, *supra* note 3, at 31. Law responded that he was investigating "the matter," and Geoghan was transferred soon afterwards. THE INVESTIGATIVE STAFF OF THE *BOSTON GLOBE*, *supra* note 3, at 32.

[10] *Geoghan Preferred Preying on Poorer Children: To Therapist, Priest Cited*

In 1992, a thirteen-year-old altar boy at St. Richard Catholic Church in Omaha, Nebraska, was befriended by his priest, Daniel Herek.[12] In an effort to gain the boy's trust, Herek manipulated the boy's interest in Native American culture, took him on trips, and gave him alcohol.[13] Herek created stories of Native American customs and rituals in order to get the boy to remove his clothing and allow Herek to molest him.[14] The

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Sexual Revolution, BOSTON GLOBE, Jan. 7, 2002, at A1. Geoghan had remained an active priest until 1993, when he was assigned a position at a retirement home. THE INVESTIGATIVE STAFF OF THE *BOSTON GLOBE*, *supra* note 3, at 26. However, the abuse allegedly did not end because more allegations arose in 1994. THE INVESTIGATIVE STAFF OF THE *BOSTON GLOBE*, *supra* note 3, at 27. Geoghan allegedly molested at least two hundred boys during a thirty-three year period in which he served as a priest in six Boston parishes. THE INVESTIGATIVE STAFF OF THE *BOSTON GLOBE*, *supra* note 3, at 6; *Boston Cardinal Acknowledges Letter*, AP ONLINE, July 17, 2001, *available at* 2001 WL 24713326.

[11] Paulson, *supra* note 9. In September 2002, the Boston Archdiocese settled the suit with eighty-six plaintiffs, including Patrick McSorley, for a total of $10,000,000. Thomas Farragher & Michael Rezendes, *Settlement Doesn't Heal Victims' Hearts After Geoghan Case, Plaintiffs Feel Defeat*, BOSTON GLOBE, Sept. 20, 2002, at A1, *available at* 2002 WL 4150014. One of Geoghan's victims commented that the amount he received in the settlement was not even enough to cover his debt or his counseling expenses, and it certainly could not compensate him for the emotional problems he has suffered as a result of Geoghan's abuse. *Id.*

Pope John Paul II accepted Cardinal Bernard Law's resignation on December 13, 2002. Michael Paulson, *A Church Seeks Healing: Pope Accepts Law's Resignation in Rome*, BOSTON GLOBE, Dec. 14, 2002, at A1. According to Bishop William S. Skylstad, vice president of the United States Conference of Catholic Bishops, "This resignation represents a significant step in the healing process, for abuse victims . . . ." *Id.*

[12] Todd Cooper, *Man Tells of Herek's Betrayal of Trust*, OMAHA WORLD-HERALD, June 6, 2002, at 1A. The boy's mother had arranged meetings for her son with Herek because she felt that the priest would be a good role model for her son and that he could teach him the "ropes of being an alter boy." *Id.*; Joseph Morton, *Victim's Mom Tells of Devastation over Herek*, OMAHA WORLD-HERALD, June 3, 2002, at 2A.

[13] Cooper, *supra* note 12. Eventually Herek and the boy formed their own Native American "tribe" and began meeting almost every evening. Cooper, *supra* note 12. The boy has described Herek as a mentor, a "tribal brother," and a "surrogate father." Cooper, *supra* note 12. The boy's parents were divorced when he was young, and he had practically been abandoned by his father. Cooper, *supra* note 12. The boy testified in court that he had been betrayed by both of his fathers—his biological father and Herek. Cooper, *supra* note 12.

[14] Cooper, *supra* note 12. Herek told the boy that the acts he performed were

abuse continued for five years, until the boy was almost eighteen.[15] In 1998, Herek was convicted of sexually assaulting the boy.[16] The boy and his mother filed suit against the Omaha Archdiocese for negligent supervision of Herek after learning that the archdiocese had frequently transferred Herek from parish to parish, ignoring warnings about Herek's misconduct for over thirty years.[17] The Archdiocese admitted that it had been negligent in supervising Herek, but the parties disagreed as to the amount of damages that the archdiocese should pay the boy and his mother, so the damages issue was presented to a jury.[18] The jury awarded the boy $750,000 and his mother $50,000 on June 14, 2002.[19]

Clergy misconduct is not limited to the Catholic Church,[20]

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therapeutic and not sexual in nature. Cooper, *supra* note 12.

[15] *Cooper*, *supra* note 12. When Herek's victim began having anger management problems, the boy's mother asked Herek to help her son, not knowing that the priest's abuse of the boy was the cause of the problem. Morton, *supra* note 12.

[16] Todd Cooper, *Mom Felt Guilty Son Was Abused; Psychologist Says She Suffers Stress*, OMAHA WORLD-HERALD, June 5, 2002, at 1B. In May of 1997, a video of naked boys was found in Herek's rectory, and he was sent to Maryland for treatment. Stephen Buttry & Joseph Morton, *Documents Detail Stream of Warnings About Herek*, OMAHA WORLD-HERALD, June 2, 2002, at 1A. In February of 1998, Herek was charged with sexual abuse and child pornography. *Id.* On January 18, 1999, Herek was sentenced to twenty months to five years in prison. *Id.* After serving two and one-half years in prison, Herek was transferred to a mental hospital. Cooper, *supra.*

[17] Buttry & Morton, *supra* at note 16. The St. John Vianney Seminary told the Omaha Archdiocese that Herek was "a definite risk" in 1965. Buttry & Morton, *supra* at note 16. Eight other lawsuits were also filed by victims of Herek. Buttry & Morton, *supra* at note 16.

[18] Cooper, *supra* note 16. Both the boy and his mother are tormented by severe psychological problems as a result of Herek's misconduct. Cooper, *supra* note 16. Herek's misconduct had confused the boy to such an extent that the boy "felt like Judas" when the abuse was discovered. Cooper, *supra* note 16. The boy threatened to commit suicide upon learning of Herek's arrest. Morton, *supra* note 12.

[19] Joseph Morton, *$800,000 Awarded in Abuse Case: A Jury Says the Church Owes an Ex-altar Boy $750,000 and His Mother $50,000*, OMAHA WORLD-HERALD, June 15, 2002, at 1A. Harold Zabin, the attorney for the boy and his mother requested that the jury award $3,000,000 to the boy and $1,000,000 to his mother to compensate them for mental suffering and cover future psychiatric treatment. *Id.* William Johnson, the attorney for the Diocese, conceded that some damages were in order, but that only about $100,000 or $200,000 was appropriate. *Id.*

[20] *See, e.g.,* Michael Paulson & Kevin Cullen, *Other Denominations Report*

nor is it limited to the United States.[21] The pattern of ignored warnings and quiet transfers of abusive clergy in the *Herek* case is unfortunately commonplace.[22] However, unlike Herek and Geoghan's young victims, many children abused by priests are not allowed to maintain a suit against a church for negligent employment, supervision or retention because a majority of jurisdictions believe that a church's constitutional free exercise rights will be violated if a court resolves these cases.[23]

This comment will examine the United States Supreme

Abuse Charges, BOSTON GLOBE, July 19, 2002, at A1, available at 2002 WL 4139271 (explaining that United Church of Christ, Unitarian Universalist Association, United Methodist Church and American Baptist Churches had received sexual abuse charges since June 2002); PHILIP JENKINS, PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS 8-12, 50-52 (1996) (listing other denominations confronting sexual abuse allegations). Jenkins also discusses the possible reasons why the media coverage of the sex abuse scandal has focused on the Catholic Church, including the size of the church, celibacy requirements, an anti-Catholic tradition, and the rigid hierarchical structure of the church. *Id.* at 8-32.

[21] *See, e.g.,* THE INVESTIGATIVE STAFF OF THE *BOSTON GLOBE*, *supra* note 3, at 4, 7 (mentioning that bishops in Poland, France, Wales and Ireland had resigned due to sex abuse scandals); Indira A. R. Lakshmanan, *Church Denies Trying to Skirt Police*, BOSTON GLOBE, May 19, 2002, at A20, *available at* 2002 WL 4127852 (discussing sexual abuse allegations in Hong Kong); Rena Singer, *South African Church Keeps Some Abuse Claims Private*, BOSTON GLOBE, May 17, 2002, at A28, *available at* 2002 WL 4127659 (discussing Catholic church officials' letter which stated that abuse allegations would not be reported to South African police).

[22] *See, e.g.,* ELINOR BURKETT & FRANK BRUNI, A GOSPEL OF SHAME: CHILDREN, SEXUAL ABUSE AND THE CATHOLIC CHURCH 3-25, 153-62 (1993)(describing cover-up of misconduct of numerous priests, including Father James Porter). Porter was yet another priest who was shuttled around from parish to parish by Cardinal Law. THE INVESTIGATIVE STAFF OF THE *BOSTON GLOBE*, *supra* note 3, at 43.

[23] *See infra* notes 78-81 and accompanying text. In fact, other victims of sexual abuse in the Boston Archdiocese may soon encounter such difficulties because Bishop Richard G. Lennon has announced that the Archdiocese will file a motion to dismiss the approximately 500 claims of abuse victims based on the Free Exercise Clause of the Constitution. Michael Rezendes & Walter V. Robinson, *Lennon Picks Sites for Sale, Eyes Court Test in Abuse Cases*, BOSTON GLOBE, Dec. 23, 2002, at A1. However, Lennon remains adamant that the Archdiocese is "committed to financial settlement" with the victims, explaining that the Archdiocese must raise all significant defenses to the claim in order to insure that the Archdiocese's insurance companies contribute to settlements with the victims. *Id.* The church may be able to receive at least $90 million for a settlement from its insurance companies. *Id.* Therefore, the church may be able to escape chapter 11 bankruptcy. *See infra* note 84.

Court and the federal circuit courts' treatment of the Free Exercise Clause of the Constitution. Furthermore, it will discuss the current split of authority in tort cases against churches resulting from abuse. Finally this comment will propose a solution to clarify the proper usage of the Free Exercise Clause in the context of the negligent employment, retention and supervision cases that result from child abuse by clergy.

II. THE FREE EXERCISE CLAUSE OF THE CONSTITUTION

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[24] However religious practice is not confined to a system of beliefs because it also can embody conduct or an omission in conflict with secular law or policy.[25] Negligent employment, supervision and retention claims against churches for clergy sexual misconduct encompass two different strands of Free Exercise case law: church autonomy and religious exemption from government laws and policies.

A. *Religious Exemption from Generally Applicable Government Laws and Policies*

In *Reynolds v. United States*,[26] the United States Supreme Court considered whether a person can claim religious exemption from a law of general applicability.[27] The Court in *Reynolds* held that the Free Exercise Clause of the Constitution did not preclude the government from regulating conduct that was based on religious belief.[28] Moreover, in *Prince v. Com-*

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[24] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990). The First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

[25] *Smith*, 494 U.S. at 877; Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) ("Thus the [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

[26] 98 U.S. 145 (1878).

[27] *Reynolds*, 98 U.S. at 161. In *Reynolds*, a man of the Mormon faith was punished for committing bigamy, a practice that he viewed as his "religious duty." *Id.* at 161-62.

[28] *Id.* at 166. The Court went on to explain that "[t]o permit this would be to

monwealth of Massachusetts,[29] the Court determined whether a woman who was a Jehovah's Witness with legal custody of her niece could be convicted of violating the Massachusetts child labor law when she gave the child pamphlets to sell on the street as part of her religious belief that she should "preach the gospel."[30] The Court sustained Prince's conviction because of the state interest in protecting children from the dangers presented by child labor.[31]

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make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 167. The Court then gave human sacrifice as an example of the outrageous conduct that could occur if a religious sect practiced human sacrifice and the government was not allowed to interfere. *Id.* at 166. However, the Court mentioned that omissions may be treated differently from positive acts in free exercise cases. *Id.* at 167 (citing Regina v. Wagstaff, 10 Cox Crim. Cases 531 (1868))(holding that parents were not guilty of manslaughter who denied their child medical treatment because of their religious beliefs). *But see* New York v. Ferber, 458 U.S. 747, 756-57 (1982)(holding that state interest in protecting physical and psychological well-being of child is compelling, so child pornography will generally not be protected under First Amendment); Osier v. Osier, 410 A.2d 1027, 1030 (Me. 1980) (ruling that right to free exercise of religion does not include practices that pose immediate and substantial threat to children).

[29] 321 U.S. 158 (1944).

[30] *Prince*, 321 U.S. at 164. Sara Prince also argued that her parental rights were violated by the statute. *Id.*; *see generally* Pierce v. Society of Sisters, 268 U.S. 510, 519 (1925) (discussing right of parents to direct education of their children).

[31] *Prince*, 321 U.S. at 168-70; *see* Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (holding that state could require Jacobson to be vaccinated in interest of public safety). *But see* Wisconsin v. Yoder, 406 U.S. 205, 230, 234 (1972) (holding that state could not compel Yoder to send his daughter to school against his Amish beliefs despite compelling government interest in education, and distinguishing *Prince* because there was no evidence that physical or mental harm to child would result); Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that state could not compel children to salute American flag at school in violation of their religious beliefs).

The Court further clarified its view of the Free Exercise Clause in *Braunfeld v. Brown*, 366 U.S. 599 (1961), when it determined that Philadelphia's Sunday Closing Law did not violate the free exercise rights of shopkeepers of the Orthodox Jewish religion by causing them a loss of profits since they believed that they should close their store on Saturday rather than Sunday. *Braunfeld*, 366 U.S. at 602, 609. In *Braunfeld*, the Court distinguished *Reynolds* and *Prince* because the religious practices in those cases conflicted with the public interest; nevertheless the Court found no Free Exercise problem with the Sunday Closing statute because the statute only placed an indirect burden on the Braunfelds' religious beliefs. *Id.* at 605, 607.

In *Sherbert v. Verner*,[32] the Court determined whether Sherbert's free exercise rights were violated when she was denied unemployment compensation for failing to accept suitable work because the jobs she was offered would require her to work on Saturday, the Sabbath day of the Seventh Day Adventist faith.[33] First, the Court determined that the unemployment agency policy placed a direct burden upon the free exercise of Sherbert's religion,[34] and then the Court determined that there was no compelling state interest in enforcement of the statute to justify the infringement on Sherbert's free exercise right.[35]

However, in *Employment Division, Department of Human Resources of Oregon v. Smith*,[36] the Court severely limited the reach of *Sherbert*.[37] Noting that the Court had never held that a person's religious beliefs excuse compliance with state laws that are otherwise valid, the Court held that the First Amendment is not violated when a law of general applicability places an incidental burden on the exercise of one's religious practices.[38] The Court found that the only cases barring application of a neutral law were those involving a hybrid of two or more constitutional claims.[39] The Court also asserted that the compelling interest test set forth in *Sherbert* had only been used to invalidate the denial of unemployment compensation, and should only be used in cases where the law or policy was not one of general applicability.[40] Therefore, the Court held that the *Sherbert* test was not applicable to "across-the-board criminal prohibitions."[41]

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[32] 374 U.S. 398 (1963).

[33] *Sherbert*, 374 U.S. at 399-400.

[34] *Id.* at 403-04.

[35] *Id.* at 406-09. The Court also noted that an Establishment Clause problem was not created by its ruling since the statute merely established neutrality among different religions by setting forth that a person should not be forced to work on his Sabbath in order to receive unemployment compensation. *Id.* at 409-10.

[36] 494 U.S. 872 (1990).

[37] *Smith*, 494 U.S. at 874. The litigants in *Smith* alleged that their free exercise rights were violated when they were denied unemployment compensation after being fired from their jobs after ingesting peyote, a drug prohibited by State law, at a ceremony of the Native American Church. *Id.*

[38] *Id.* at 878-79. When the object of a law is not to burden religion, but religion is nevertheless burdened by the law, the law only places an incidental burden on one's free exercise rights. *See id.*; United States v. Lee, 455 U.S. 252, 258-61 (1981)(employee was not exempted from paying social security taxes despite fact that his Amish beliefs prohibited participation in government support programs); *see also Prince*, *supra* notes 29-31 and accompanying text.

[39] *Smith*, 494 U.S. at 881; *see, e.g., Yoder*, 406 U.S. at 230, 234 (parental and religious rights); *Barnette*, 319 U.S. at 642 (free speech and religious rights);

B. The Church Autonomy Doctrine

In 1871, the Supreme Court placed limitations on the civil courts' jurisdiction over church disputes.[42] In *Gonzalez v. Roman Catholic Archbishop of Manila*,[43] the Court furthered its policy of church autonomy when it held that a court could not second-guess a church tribunal's decision.[44]

Furthermore, in *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*[45] the Court held that a court cannot substitute its judgment for that of a church's highest tribunal,[46] and in *Presbyterian Church v.*

Cantwell, 310 U.S. at 304-07 (free speech and religious rights); *Pierce*, 268 U.S. at 510 (parental and religious rights). Since the litigants in *Smith* only alleged that their free exercise rights had been violated, their case did not fall within the hybrid exception. *Smith*, 494 U.S. at 882.

[40] *Id.* at 883. The Court noted that the *Sherbert* test had been used in many other cases but had rarely been successful in overturning the government policies in question. *Id.* The Court reasoned that the test had been created for situations of "individualized government assessment." *Id.* at 884. Furthermore, the Court opined that it would be "courting anarchy" to subject all government regulations to strict scrutiny when they are attacked based on religious grounds. *Id.* at 888; *accord Reynolds*, 98 U.S. at 167.

[41] *Smith*, 494 U.S. at 884-85.

[42] Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1871). In *Watson*, some members of the church alleged that others were not legitimate members since the pastor and elders who accepted them into the church did not have the authority to do so. *Watson*, 80 U.S. at 684-88.

[43] 280 U.S. 1 (1929).

[44] *Gonzalez*, 280 U.S. at 16. In *Gonzalez*, the petitioner sought to be determined the legal successor to the chaplaincy, thus entitling him to income that accrued during the vacancy of the position. *Id.* at 11-14; *see also* Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 116 (citing *Watson*, 80 U.S. at 727) (noting that "[t]he opinion [in *Watson*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation . . . ").

[45] 426 U.S. 696 (1976).

[46] *Milivojevich*, 426 U.S. at 708-09.

Mary Elizabeth Blue Hull Mem. Presbyterian Church[47] the Supreme Court determined that the Free Exercise Clause precludes courts from resolving church disputes that would require adjudication of issues arising in church doctrine.[48]

Nevertheless, in these opinions it appears that the Court intended for the church autonomy doctrine to have limits. For example, in *Watson,* the Court held that the civil courts did not have jurisdiction over a dispute that is "*strictly and purely* ecclesiastical in its character . . . ."[49] Moreover, in *Gonzalez*, the Court limited its opinion to "the decisions of the proper church tribunals on matters *purely ecclesiastical*. . . ."[50] In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*[51] the Court found that "[f]reedom to select the clergy, *where no improper methods of choice are proven*, we think, must now be said to have federal constitutional protection as part of the free exercise of religion . . . ."[52]

However, the lower courts often overlook the limiting language in these Supreme Court opinions and refuse to determine if "no improper methods of choice are proven"[53] or if the subject of the dispute is "strictly and purely ecclesiastical."[54] Most of the circuit courts, for example, assume that employment discrimination cases and other disputes between a church and a member of its clergy are unequivocally barred by the Free Exercise Clause. The circuit courts refer to this doctrine as the ministerial exception, and it was created to exempt churches from Title VII.[55] This doctrine is treated slightly differently by each of the circuit courts. Some circuits do not require a church to even propose a religious justification for the employment decision it made, thus not even reaching the question of whether ecclesiastical doctrine is implicated.[56] Instead, these courts assume that when such a dispute arises, it is inherently ecclesiastical.

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[47] 393 U.S. 440 (1969).

[48] *Hull*, 393 U.S. at 449 (concerning church land dispute). However, the Court acknowledged that property disputes in which "neutral principles of law" could be applied would not be off-limits to the civil courts. *Id.*; *accord Jones v. Wolf*, 443 U.S. 595, 603-05 (1979).

[49] *Watson*, 80 U.S. at 733 (emphasis added).

[50] *Gonzalez*, 280 U.S. at 16 (emphasis added). The Court also noted that an exception to the doctrine may exist where fraud, collusion or arbitrariness were present. *Id.* The Court later disposed of the possibility of an arbitrariness exception. *Milivojevich*, 426 U.S. at 712.

[51] 344 U.S. 94 (1952).

[52] *Kedroff*, 344 U.S. at 115 (emphasis added).

[53] *Id.*

[54] *Watson*, 80 U.S. at 733.

[55] *See infra* notes 57-59.

The Fifth Circuit created the ministerial exception in *McClure v. The Salvation Army*.[57] In *McClure*, the court referred to the relationship between a church and its ministers as the church's "lifeblood."[58] After discussing *Watson*, *Gonzalez*, *Kedroff* and the other Supreme Court church autonomy cases, the court held that the application of Title VII to the employment relationship between a church and its minister would result in an impermissible burden on the free exercise of religion.[59] However, the court noted that a possible limit to the ministerial exception existed "when it is necessary to 'prevent grave and immediate danger to interests which the state may lawfully protect.'"[60] In a similar case, the Fourth Circuit made two inquiries: whether the application of Title VII to the church would place a burden on the free exercise of religion and whether there was a compelling government interest that outweighed the church's right to free exercise.[61] The Fourth Circuit noted the great importance of eliminating racial, sexual and other forms of discrimination, but held that the church's free exercise right outweighed this interest because of the functions that a minister performs for a church.[62] Furthermore, in

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[56] *See, e.g.,* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (1985), *cert. denied*, 478 U.S. 1020 (1986). *But see* Drevlow v. Lutheran Church, Mo. Synod, 991 F.2d 468, 471 (8th Cir. 1993) (requiring that church provide religious explanation in order to claim immunity under Free Exercise Clause).

[57] 460 F.2d 553, 560 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972), *reh'g denied*, 409 U.S. 1050 (1972).

[58] *McClure*, 460 F.2d at 558.

[59] *Id.* at 560.

[60] *Id.* at 558 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *see also Sherbert*, 374 U.S. at 406-08 (1963) (applying compelling state interest test).

[61] *Rayburn*, 772 F.2d at 1167-68.

[62] *Id.* at 1168.

Minker v. Baltimore Annual Conference of the United Methodist Church[63] when the claimant questioned what would happen if a church determined that it would use a game of Russian roulette in order to determine who would be its next minister, the District of Columbia Circuit responded that there were two limits to the ministerial exception: the compelling government interest test and the possible fraud and collusion exception mentioned in *Gonzalez*.[64]

The circuit courts who have encountered the issue have held that *Smith* does not dispose of the ministerial exception. These courts have cited two reasons for this finding: the ministerial exception was created to prevent government interference with a church's policies regarding employment decisions,[65] and the unlikelihood that "the Supreme Court in *Smith* intended to qualify this century-old affirmation of a church's sovereignty over its own affairs."[66] While these courts maintain that *Smith* had no effect on the ministerial exception, they either barely mention or completely overlook the fact that the compelling interest test had previously served as a possible limitation to the doctrine.[67] Therefore, while the *Smith* decision placed limits on the free exercise rights of individuals it has, in effect, ironically also increased the free exercise rights of churches by completely excusing them from liability in employment disputes. In *Smith*, the Court's motivations for doing away with the compelling interest test in religious exemption cases included preventing "anarchy."[68] Moreover, the Court in *Smith* noted that the compelling interest test was rarely useful in defeating a state law which placed an incidental burden on an individual's right to free exercise of religion.[69] The circuit courts apparently began to overlook the compelling interest test because the early cases on the subject found that the free exercise concerns outweighed the government interest in preventing and ending sexual and racial discrimination.

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[63] 894 F.2d 1354 (D.C. Cir. 1990).

[64] *Minker*, 894 F.2d at 1357; *see supra* note 50.

[65] EEOC v. The Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996); Combs v. The Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999). In *Catholic University of America*, a nun and professor at the university sued her employer for sex discrimination and retaliatory conduct after she was denied tenure. *Catholic University of America*, 83 F.3d at 455. Similarly in *Combs*, a Methodist church was sued by a female minister for sex and pregnancy discrimination after she was fired from her job as an associate minister following an absence due to complications resulting from childbirth. *Combs*, 173 F.3d at 344-45. Combs argued that her claim was distinguishable from that of the professor in *Catholic University of America* because her case would not require a court to inquire into and evaluate religious doctrine. *Id.* at 350. However, the court responded that "secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal." *Id.*

[66] *Catholic Univ. of Am.*, 83 F.3d at 463; *Combs*, 173 F.3d at 349.

[67] *See Catholic Univ. of Am.*, 83 F.3d at 462.

III. THE CURRENT SPLIT OF AUTHORITY IN TORT CASES AGAINST CHURCHES RESULTING FROM NEGLIGENT HANDLING OF ABUSIVE CLERGY

A split of authority has occurred among the state supreme courts and federal circuit courts on the issue of whether lawsuits against churches for negligent handling of abusive clergy violate the Free Exercise Clause.[70] For example, basing its decision on *Smith* and *Hull*, the Colorado Supreme Court has twice held that a negligent hiring and supervision suit against a church did not violate the First Amendment because neutral principles of law could be applied to the issues in the case without infringing on the free exercise rights of the church.[71] Similarly, the Second Circuit and the Washington Supreme Court have held that the First Amendment does not prohibit civil courts from deciding secular aspects of church disputes.[72] In a case decided in the midst of the John Geoghan scandal,[73] the Florida Supreme Court held that a suit against a church for negligent handling of an abusive clergyman could not be dismissed at the pleading stage using the Free Exercise Clause.[74] The Florida court noted that "intrachurch disputes" are distinguishable from disputes that arise between third parties and churches[75] and pointed out that the United States Supreme Court church autonomy decisions were limited to "strictly ecclesiastical intrachurch disputes that have been resolved through an ecclesiastical tribunal."[76] The court also explained that under *Smith* and *Lukumi Babalu*, strict scrutiny was not warranted because the tort alleged involved a neutral policy of general applicability.[77]

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[68] *See supra* note 40 and accompanying text.

[69] *See supra* notes 40-41 and accompanying text.

[70] See *Malicki v. Doe*, 814 So. 2d 347, 351 n.2, 357 n.7 & 359 n.10 (Fla. 2002), and *N. H. v. Presbyterian Church*, 998 P.2d 592, 602 n.47 (Okla. 1999), for thorough lists of cases on this subject.

[71] Moses v. The Diocese of Colo., 863 P.2d 310, 319-20 (Colo. 1993), *cert.denied*, 511 U.S. 1137 (1994); Bear Valley Church of Christ v. Debose, 928 P.2d 1315 (Colo. 1997), *cert. denied*, 520 U.S. 1241 (1997), *and cert. denied*, 520 U.S. 1248 (1997); *see also* Sanders v. Casa View Baptist Church, 134 F.3d 331, 335-36 (5th Cir. 1998), *cert. denied*, 525 U.S. 868 (1998) ("The First Amendment does not categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protection to the secular components of these relationships."); Enderle v. Trautman, No. CIV.13-01-22, 2001 WL 1820145, at *9 (D.N.D. Dec. 3, 2001) (slip op.) (holding that plaintiffs' negligent supervision and retention claims against Lutheran Church were not barred by First Amendment because claims did not require court to interpret church doctrine); Doe v. Hartford Roman Catholic Diocesan Corp., 716 A.2d 960, 964-65 (Conn. Super. Ct. 1998) (finding that negligent supervision claim against Catholic church would not burden religious practices of Catholicism); Kenneth R. v. Roman

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Catholic Diocese of Brooklyn, 654 N.Y.S.2d 791, 795-97 (N.Y. App. Div. 1997), *cert denied*, 522 U.S. 967 (1997) (holding that plaintiff's negligent supervision and retention claims were not barred, based on *Smith*, *Moses* and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)). *But see* Ayon v. Gourley, 47 F. Supp. 2d 1246, 1248-51 (D. Colo. 1998), *aff'd on other grounds*, 185 F.3d 873 (10th Cir. 1999) (holding that torts are not laws of general applicability and rejecting Colorado state court holdings in *Bear Valley* and *Moses*).

[72] Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 431 (2d Cir. 1999); C.J.C. v. Corp. of the Catholic Bishop of Yakima, 985 P.2d 262, 277 (Wash. 1999). The court in *Martinelli* cited *Jones v. Wolf* and *Hull*, cases in which the Supreme Court found that a church property dispute does not violate the free exercise clause when neutral policies of law can be applied to the dispute. *Martinelli,* 985 P.2d at 431. However, the Washington Supreme Court cited only the Fifth Circuit case, *Sanders. C.J.C.*, 985 P.2d at 727-28; *see supra* note 71. The court in *Martinelli* used an interesting analogy in order to clarify its holding: hearsay is generally not admissible to prove the truth of the matter asserted, and similarly a religion's beliefs can be admitted in court, but the truth or falsity of these beliefs cannot be determined by the court. *Martinelli,* 985 P.2d at 431.

[73] *See supra* notes 3-11 and accompanying text.

[74] *Malicki*, 814 So. 2d at 365.

[75] *Id.* at 356. The court stated that the first inquiry in these cases is whether the dispute is ecclesiastical in nature. *Id.*

[76] *Id.* at 363.

[77] *Id.* at 364. However, the majority opinion in *Malicki* was strongly criticized and much of the language discussing whether the First Amendment would bar the plaintiffs' claims was branded dicta by the dissenting and concurring justices on the Florida Supreme Court. *See, e.g., id.* at 366 (Wells, C.J., concurring in

However, relying heavily on the United States Supreme Court's church autonomy decisions, the Wisconsin Supreme Court held that negligent hiring and retention claims against churches resulted in excessive entanglement, and that negligent hiring and supervision claims would require a court to inquire into church doctrine.[78] The court noted that the question of whether the negligent training and supervision claims were barred by the First Amendment was a closer issue.[79] The Supreme Court of Missouri made an even larger distinction between different tort claims against churches when it held that hiring and retention claims were barred by the First Amendment, but that the plaintiff's claim against a church for intentional failure to supervise a priest was not barred.[80] The court based this distinction on *Smith* and noted that "[r]eligious conduct intended or certain to cause harm need not be tolerated under the First Amendment."[81]

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result only).

[78] Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 791 (Wis. 1995), *cert denied*, 516 U.S. 1116 (1996). In *Pritzlaff*, a parishioner sued the archdiocese for negligent hiring, retention, training and supervision of a priest who allegedly coerced the adult parishioner into having sexual relations with him. *Pritzlaff*, 533 N.W.2d at 782; *see* Swanson v. The Roman Catholic Bishop of Portland, 692 A.2d 441, 443 (Me. 1997) (holding that when court subjects relationship between church and its clergy to secular legal theories such as cause of action for negligent supervision, court interferes with church doctrine).

[79] *Pritzlaff*, 533 N.W. 2d at 791.

[80] Gibson v. Brewer, 952 S.W.2d 239, 246-48 (Mo. 1997). A young boy and his parents sued the Catholic Chancery-Diocese of Kansas City-St. Joseph for negligence in hiring, retaining and supervising a priest after the archdiocese shrugged off the multitude of complaints about the priest's sexual misconduct. *Gibson*, 952 S.W.2d at 243-44. When the plaintiffs originally notified the diocese that the priest had fondled their son, the diocese responded that "this happens to young men all the time" and that the boy "would get over it." *Id.* at 243.

However, the Massachusetts Supreme Judicial Court has held that an intentional infliction of emotional distress claim against a church is barred by the First Amendment in certain situations. Murphy v. I.S.K.CON. of New England, 571 N.E.2d 340, 348 (Mass. 1991), *cert. denied,* 502 U.S. 865 (1991). In *Murphy*, the Krishna Consciousness assisted a minor in running away from home to join the church and helped her pretend to be married to a young man who allegedly sexually abused her. *Murphy*, 571 N.E.2d at 342-44. The court in *Murphy* seemed to be most concerned that the trial judge had allowed scriptural passages regarding the church's belief that women are inferior to men to be admitted as evidence supporting the plaintiff's claim. *Id.* at 346-47.

[81] *Gibson*, 952 S.W.2d at 248.

IV. CLARIFICATION OF FREE EXERCISE JURISPRUDENCE IN THE CONTEXT OF THE CLERGY ABUSE SCANDAL

Police departments, prosecutors, courts and even the news media have long been reluctant to hold churches accountable for clergy child abuse.[82] This long-running hands-off approach has probably contributed to the magnitude of the current clergy abuse scandal because churches have not been punished for the continuing occurrence of this misconduct, the clergy were rarely if ever prosecuted for their crimes, and churches were allowed to pressure victims into quietly settling disputes. Fortunately, the news media eventually broke the painful silence.[83] Upon learning of the huge cover-up in Boston's Archdiocese, public outrage resulted, victims began to sue, and prosecutors began to press criminal charges. It is now time for the civil courts to follow suit and hold churches accountable as well.

The ministerial exception should be extended to all tort suits involving employment decisions of churches because the allowance of too many limitations on the free exercise doctrine could cause a domino effect, resulting in church bankruptcies and severe free exercise violations.[84] Furthermore, even when a court is able to consider a civil claim without inquiring into church doctrine, the church's free exercise rights will always be burdened at least to some extent because the court must apply secular law to the ecclesiastical doctrine of the church.[85] Moreover, negligent supervision and retention claims will occasionally interfere more directly with church policies.[86] However, the ministerial exception should retain the limits that were placed on it when it was first created in *McClure*, for although the litigant in *Minker*'s example of a church using Russian roulette to choose a minister may seem farfetched,[87] the clergy abuse scandal demonstrates that serious abuses of the free exercise of religion do in fact occur that demand the civil courts' attention.

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[82] THE INVESTIGATIVE STAFF OF THE *BOSTON GLOBE*, *supra* note 3, at 119-40.

[83] The media had reported on abuse allegations in the past and even books had been written on the subject, but the magnitude of the scandal and, most importantly, the extensive cover-up were first unveiled by *The Boston Globe* in January of 2002. *See* THE INVESTIGATIVE STAFF OF THE *BOSTON GLOBE*, *supra* note 3, at 4.

[84] *See* Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y. 1991) ("Any award of damages would have a chilling effect leading indirectly to state control over the future affairs of a religious denomination. . . . "); *Watson*, 80 U.S. at 729 (noting that "chilling effect" on free exercise of religion could result if civil courts were allowed to delve into religious doctrine); Thomas Farragher & Michael Rezendes, *Law Given Authority to Seek Ch. 11*, BOSTON GLOBE, Dec. 5, 2002, at A1 (explaining that Boston Archdiocese is contemplating filing for Chapter 11 Bankruptcy); Kathleen Burge, *Chancellor Details Money Crunch*, BOSTON GLOBE, Aug. 6, 2002, at B2 (reporting that Catholic diocese in Boston is having difficulty getting loans and has had to cut its budget by forty percent due to damage recent scandal has caused to Church's fund-raising campaign).

When *Smith* applies, a free exercise claim fails,[88] while the church autonomy doctrine is meant *to protect* the free exercise of religion.[89] Therefore, *Smith* is incongruous with the ministerial exception and church autonomy doctrines and should not be used in order to prevent courts from engaging in strict scrutiny review of these cases. The compelling interest test is probably the best limitation for the ministerial exception because, as Justice Scalia pointed out in *Smith*, the test only allows infringement on free exercise rights in rare instances,[90] and it requires a case-by-case inquiry.[91]

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[85] *See supra* notes 65, 78-81 and accompanying text.

[86] For example, the Catholic Church has a policy of repentance and lifelong employment for priests. David France, *Day of Atonement: The U.S. Bishops Met, Prayed, Argued– and, Finally Voted*, NEWSWEEK, June 24, 2002, at 80, *available at* 2002 WL 7294497 ("[O]nce a man is ordained, he is forever a priest."). France also discusses a new policy adopted by bishops in 2002 which provides for zero tolerance of abusive priests but no penalties for cardinals and bishops who harbor pedophile priests. *Id.* However, the Vatican expressed disapproval with the policy because of concern that it would interfere with the Catholic church's policies and canon law. Alan Cooperman, *In Search of Clarity, and Fairness; Vatican Worries That U.S. Sex Abuse Policy Abandons "Due Process"*, WASH. POST, Oct. 21, 2002, at A2, *available at* 2002 WL 101778571. After undergoing revision in November of 2002, the policy was approved by the Vatican. Michael Paulson, *Final OK Given to US Bishop's Child-Protection Policy*, BOSTON GLOVE, Dec. 17, 2002, at A39. The policy requires that abusive priests be terminated and requires that all dioceses have written policies on sexual abuse, but the November revisions to the policy ensured better protection of the rights of accused priests and the authority of bishops. *Id.* These revisions have caused concern among many victims' groups that the policy will result in ever more secrecy in the handling of abuse. *Id.*

[87] *See supra* notes 60-64 and accompanying text.

[88] *See supra* notes 36-41 and accompanying text.

[89] *See supra* notes 42-52 and accompanying text.

[90] *See supra* notes 40-41 and accompanying text.

Although the issue of whether the government interest in preventing employment discrimination outweighs the free exercise rights of a church may have already been resolved by the circuit courts, the issue of whether the interest in protecting children from abuse outweighs this interest still remains to be resolved because the issues and interests at stake are far different from that in an employment discrimination case. First, the burden placed on religion will usually be minimal in negligent hiring cases that result from clergy child abuse because it will rarely if ever be necessary to determine the religious merits in hiring a potential pedophile. Negligent hiring, supervision and retention cases are distinguishable from Title VII and other employment discrimination cases. For instance, in employment discrimination cases, a member of the clergy sues his church, while in negligent hiring suits a member of the church sues the church for its negligence in hiring a member of its clergy. Therefore an important distinction results: in employment discrimination cases the court must determine whether a person would otherwise be a good minister.[92] Simply put, in an employment discrimination case the court is dictating whether a church should hire someone. On the other hand, the court in a negligent hiring case is only determining whether it was reasonably foreseeable that the person would cause the harm that resulted.[93]

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[91] A court must look at the facts of each case in order to determine first how much of a burden will be placed on the church's practices and second whether there is a compelling state interest. *See supra* notes 32-35 and accompanying text. This is important for negligent hiring and supervision cases against churches because different religions have varying policies that may be involved in the decision to retain a member of the clergy, and in some cases the state interest will be more compelling than in others.

[92] *See supra* note 65 and accompanying text.

[93] *Malicki*, 814 So. 2d at 362. Civil courts can use mediation and other methods of arbitration to effectively protect the rights of all the parties involved and assist them in resolving not only the monetary aspects of the dispute but also some of the emotional aspects, as demonstrated by a September 2002 Rhode Island settlement resulting from mediation ordered by the Rhode Island Supreme Court. Jennifer Levitz, *Abuse Settlement: $13.5 Million*, PROVIDENCE J., Sept. 10, 2002, at A1, *available at* 2002 WL 22520856. Some of the abuse victims in the Rhode Island suit expressed great relief and a feeling of closure after receiving a

Second, the government interest in protecting children is of the utmost importance. The Supreme Court has long treated cases where children's safety is involved with great care, often creating different standards for children than for adults.[94] Courts should further this great concern for the safety and welfare of children by refusing to allow churches who have harbored the perpetrators of the continual abuse of children to avoid the civil ramifications of their negligence.[95]

V. CONCLUSION

There is no need to describe the scientific, psychological effects that sexual abuse has on children for the victims' stories speak for themselves. It is most unfortunate, however, that not every child's story can be known or told. As former priest John Geoghan confessed, abusive clergy pick out the most vulnerable—children from low income families, children being raised by single mothers, and children who are in the midst of a family crisis. Ironically and sadly, many parents of abused children even sent their children back to the abusive clergyman for further assistance when psychological problems arose, not knowing that the clergyman had caused the problem. Thus, the most trusted preyed on and abused the most vulnerable.

As John Donne eloquently explained centuries ago, a church should take great care to protect its children. However, when a church fails to take this responsibility to heart in a ruthless attempt to safeguard its reputation and its clergy, the courts should step in and make sure that children are not knowingly yet secretly put in harm's way. The ministerial ex-

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heartfelt apology for the pain they had suffered from Bishop Robert E. Mulvee. *Id.*

[94] *See supra* notes 28-31 and accompanying text; REBECCA M. BOLEN, CHILD SEXUAL ABUSE: ITS SCOPE AND OUR FAILURE 84 (2001)("*all* children have the *right* to be protected [from sexual abuse]"); see also Parks v. Kownacki, 711 N.E.2d 1208, 1210-12, 1214, (Ill. 1999), *rev'd*, 737 N.E.2d 287 (Ill. 2000), for details and sources on the harmful effects of child sexual abuse and an especially graphic, disturbing account of a priest's sexual abuse of a young girl.

[95] Civil courts should also consider that adults voluntarily associate themselves with a church, thus subjecting themselves to their chosen churches' policies, but children are not always capable of making such a choice.

ception should be applied to all cases involving negligent handling of clergy, but the clergy child abuse scandal demonstrates the desperate need for a limitation to this doctrine. The proper limitation to the doctrine is the compelling interest test because this test will best be able to closely guard the free exercise rights of churches while still protecting the innocent young victims of clergy sexual abuse. In most negligent handling cases against churches, the state interest in preventing child abuse should outweigh the burden that is placed on the free exercise rights of the church.

Brittany Reid

RECENT DECISIONS

Constitutional Law—First Amendment—School Voucher Program Held Constitutional Under the Establishment Clause

I. FACTS

The Ohio legislature passed its Pilot Project Scholarship Program, as well as other legislation, in an effort to provide financial assistance and educational choices to the parents of children in the failing Cleveland City School District.[1] The school district was comprised primarily of minorities who lived at or near poverty level and had no means to send their children to any other schools except for the Cleveland City Schools, which are listed as "among the worst performing public schools in the Nation."[2] The Pilot Project Scholarship Program provided tuition assistance to parents for use at participating public school districts in the area or for use at a private school, without regard to religious affiliation, within the limits of the covered school district.[3] The financial need of the families determined the amount of tuition assistance dispersed, with the families living the most below poverty level given top priority.[4] In addition to the tuition assistance aspect of the program, the legislature also established a second aspect of the program providing tutorial aid for those students who remained in a public school.[5] In 1999-2000, 100% of the schools participating in the program were private schools, 82% of the participating private schools were religiously affiliated and more than 96% of the participating students enrolled in schools with a religious affiliation.[6]

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[1] Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2463 (2002). The Ohio Pilot Project Scholarship Program, OHIO REV. CODE ANN. §§ 3313.974-3313.979 (Anderson 2002), provided vouchers for parents of children in the Cleveland City School District so that they may make educational choices for their children. *Zelman*, 122 S. Ct. at 2462-63. The program only applied to school districts under the control of the State Superintendent as a result of a federal court order, and the Cleveland City School District was the only such district in the state. *Id.* at 2463. The legislature also initiated programs governing community and magnet schools as part of the public school system. *Id.* at 2464. Over 1900 students were enrolled in ten community schools and over 13,000 students were enrolled in twenty-three magnet schools during the 1999-2000 school year. *Id.* at 2464-65.

[2] *Id.* at 2463. The Cleveland City School District, facing a "crisis that is perhaps unprecedented in the history of American education," fell short of achieving minimal competency in all eighteen state standards. *Id.*

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[3] *Id.* at 2463. Public schools participating in the program received a grant of $2250 for each child participating in the program in addition to the state funding allotted for each student. *Id.* Private schools had to meet guidelines and standards for education established on the state level, and they had to "agree not to discriminate on the basis of race, religion, or ethnic background, or to 'advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.'" *Id.* (quoting Ohio Rev. Code Ann. § 3313.976(A)(6) (Anderson 2002)). Parents who chose a private school were given a check made out to them to be paid to the private school of their choice. *Id.* at 2464.

[4] *Id.* at 2464. Those given the greatest priority were families below 200% of the poverty level, and they were eligible for $2250 or 90% of private school tuition with no co-pay over $250. *Id.* All other eligible families could have received $1875 or 75% of private school tuition with no upper cap on co-pay amounts. *Id.* There were only a certain number of scholarships available, and that number was to be set each year by the Ohio Superintendent for Public Instruction. *Id.* at 2464 n.2.

[5] Id. at 2463. Parents were able to choose "registered tutors" to provide tutorial assistance to their children, and the costs for such services were paid by the State. *Id.* at 2464. The tutorial aid grants were distributed with priority based on financial need much like the tuition assistance grants with a maximum amount of $360. *Id.* The number of tutorial aid grants had to be equal to the number of tuition aid grants disbursed to parents of students who chose to send their children to private or adjacent public schools outside of the district. *Id.*

[6] *Zelman*, 122 S. Ct. at 2464. No adjacent public school districts participated in the program in 1999-2000. *Id.* There were fifty-six participating private schools and forty-six of those were religiously affiliated schools. *Id.* More than 3700 students received tuition assistance, and about 1400 students received tutorial assistance in the 1999-2000 school year. *Id.* The voucher program was only one of several initiatives introduced by the State of Ohio to combat the problem of failing schools in Cleveland. *Id.* Other initiatives included the creation of community schools, schools funded by the State but not under the auspices of a local

A group of Ohio taxpayers initially challenged the Ohio program in state court, and, as a result, the legislature cured the procedural defects in the program that were held to violate the state constitution.[7] In 1999, the respondents brought suit in the United States District Court for the Northern District of Ohio challenging the state's program as a violation of the First Amendment's Establishment Clause in which the Court granted summary judgment for the respondents.[8] The United States Court of Appeals for the Sixth Circuit affirmed the lower court's ruling.[9] The respondents appealed, and the United States Supreme Court granted certiorari and held: reversed.[10] A government program, completely neutral in regards to religion, providing benefits to a range of people with distinctions made only on the basis of financial need and allowing for the exercise of legitimate choice between private and public options and sectarian and non-sectarian options does not violate of the Establishment Clause of the United States Constitution.[11]

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school district, and the creation of magnet schools, which are public schools that emphasize particular teaching styles and methods or cater to the needs of certain children. *Zelman,* 122 S. Ct. at 2464-65.

[7] *Id.* at 2465. The respondents brought state and federal claims before the Ohio Supreme Court. *Id.* The federal claims were rejected by the court, but the court held that the program's enactment violated the Ohio Constitution based on procedural guidelines. *Id.*

[8] *Id.* at 2465. The district court barred further implementation of the program by issuing an injunction, which was stayed by the United States Supreme Court pending review by the Sixth Circuit. *Id.* The Sixth Circuit issued its opinion in December of 2000. *Id.*

[9] *Id.* at 2465. The Sixth Circuit held that Ohio's program "had the 'primary effect' of advancing religion in violation of the Establishment Clause." *Id.* After the divided court of appeals summary judgment ruling, the Sixth Circuit stayed its mandate until possible review by the United States Supreme Court. *Id.*

[10] *Id.* at 2465. The case resulted in a five to four decision by the Court with the majority opinion written by Chief Justice Rehnquist and concurring opinions written by Justices O'Connor and Thomas. *Id.* at 2463, 2473, 2480. Dissenting opinions were written and filed by Justices Stevens, Souter and Breyer. *Id.* at 2484-85, 2502.

[11] *Zelman,* 122 S. Ct. at 2473. The Court pointed out that the program was of a completely secular nature and established to provide assistance to impoverished families in a failing school district. *Id.* at 2465. The Court stated the question before them as "whether the Ohio program nonetheless has the forbidden 'effect' of advancing or inhibiting religion." *Id.* The Court contended that the expenditure

II. RELATED LAW

The Establishment Clause of the First Amendment to the United States Constitution begins, "Congress shall make no law respecting an establishment of religion . . . ."[12] Since the advent of modern Establishment Clause interpretation by the Supreme Court in the mid-twentieth century, the Court's understanding and discernment of this clause has been complex.[13] This section explores the seminal cases that have helped shape the evolution of modern Establishment Clause jurisprudence up to the Court's present-day favorable analysis of a publicly-funded school voucher program.[14]

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of public funds to religious schools was completely a matter of private choices made by the parents participating in the program without any incentives or disincentives by the State. *Id.* at 2466. The Court also stated that they were following Supreme Court precedent by rejecting Establishment Clause challenges to neutral government programs providing aid to groups of persons who then chose to use the money at religious schools or institutions. *Id.*

[12] U.S. CONST. amend. I. The Supreme Court held that the First Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (reversing convictions of Jehovah's Witnesses who were arrested for proselytizing door-to-door in violation of city ordinance); *see* U.S. CONST. amend. XIV (stating, in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law"). The application of the Establishment Clause to the states via the Fourteenth Amendment may be perplexing due to the specific language of the First Amendment, which reads as a limitation only on Congress. Douglas C. Shimonek, Comment, *Using the* Lemon *Test as Camouflage: Avoiding the Establishment Clause,* 16 WM. MITCHELL L. REV. 835, 839 n.15 (1990). *See generally* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (establishing fundamental right for parents in rearing and educating their children under substantive due process).

[13] *See* Shimonek, *supra* note 12, at 835. The Supreme Court's interpretation and understanding of the Establishment Clause has not been clearly enunciated over the years. Michael J. Frank, *The Evolving Establishment Clause Jurisprudence and School Vouchers*, 51 DEPAUL L. REV. 997, 1038 (2002) (asserting present-day Court is much more accepting of concomitant church-state relationships); Roald Y. Mykkeltvedt, *Souring on* Lemon: *The Supreme Court's Establishment Clause Doctrine in Transition*, 44 MERCER L. REV. 881, 883 (1993) (describing Court's actions as "evinc[ing] a schizoid approach to Establishment Clause cases"). The application of the Establishment Clause to cases involving religious schools that receive public aid has always been a problematic area for the Court. Joel Bacon, Note, *Division over Diversion:* Mitchell v. Helms, *530 U.S. 793 (2000),* 80 NEB. L. REV. 354, 355 (2001).

[14] *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1507-08 (14th ed. 2001). Prior to the 1940's, there were only two major

A. *Early Establishment Clause Jurisprudence and the Wall of Separation*

In *Everson v. Board of Education*,[15] the Court considered whether a state may fund any part of the education of students not enrolled in a public school without violating the United States Constitution.[16] The case involved a New Jersey statute that sanctioned the transportation of students to both public and private schools by local school districts.[17] The Court helped establish the strictures of the Establishment Clause[18] and emphatically ruled that there is a "wall between

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United States Supreme Court decisions involving governmental aid to religious establishments, and they failed to invoke any lasting Establishment Clause jurisprudence. *Id.* at 1508. *See* Bradfield v. Roberts, 175 U.S. 291, 298-300 (1899) (finding federally funded hospital managed by Roman Catholics in District of Columbia did not violate Establishment Clause); Reuben Quick Bear v. Leupp, 210 U.S. 50, 81-82 (1908) (ruling money allocated to American Indians could be spent for religious education if they so chose so as not to violate free exercise rights).

[15] 330 U.S. 1 (1947).

[16] Everson v. Bd. of Educ., 330 U.S. 1, 5 (1947). The respondents contended that there was a violation of the Constitution in two respects. *Everson*, 330 U.S. at 5. They argued not only that the State was forcing taxpayers to fund religious education by the Catholic Church, but also that the State was taking the private property of some citizens and giving it to others for their own private use. *Id.* Justice Jackson wrote that the primary question was whether "it [is] constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?" *Id.* at 21 (Jackson, J., dissenting).

[17] *Id.* at 3 n.1. Specifically, this case involved the actions of a school district that reimbursed the parents of parochial school children for transportation expenses. *Id.* at 3. *See* Bd. of Educ. v. Allen, 392 U.S. 236, 238, 243 (1968) (upholding New York law requiring school boards to supply free textbooks to students attending religiously affiliated private schools if schools met state compulsory education laws); *see also* Cochran v. Bd. of Educ., 281 U.S. 370, 375 (1930) (upholding constitutionality of state law providing free textbooks to all students in challenge brought before Establishment Clause applied to states).

[18] *Everson*, 330 U.S. at 15-16. Justice Black wrote for the majority and stated the Establishment Clause of the First Amendment means at the very least that "[n]either a state nor the Federal Government can set up a church . . . [nor] can [it] pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 15. *See* Ashley M. Bell, Comment, *"God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions*, 50 AM. U. L. REV. 1273, 1284-85 (2001) (asserting *Everson* was advent of Court's attention to Establishment Clause and effort to identify its parameters).

church and state . . . [t]hat wall must be kept high and impregnable."[19] Nevertheless, the Court held that the statutory scheme in this instance was not a violation of the Establishment Clause despite the Court's introduction of the "wall of separation" doctrine into the modern jurisprudential vernacular.[20] Despite the Court's ardent adherence to separation, it ultimately relied on its interpretation of the First Amendment that states should be neutral, not adversarial, in regard to religion.[21] The Court upheld the New Jersey statute because it did not concern the "religious function" of the parochial schools.[22]

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[19] *Everson,* 330 U.S. at 18. A year after *Everson*, Justice Stanley Reed rebuked the Court's "strict separationist" approach and stated, "[d]evotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people." Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 256 (1948) (Reed, J., dissenting); *see also* Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 294 (2002) (describing words of Justice Black as "famously paradoxical" and discrediting separation of church and state as valid constitutional law doctrine).

[20] *Everson,* 330 U.S. at 18. By the early 1960's, Justice Douglas, a member of the majority in *Everson*, capitulated and wrote that *Everson* "seems in retrospect to be out of line with the First Amendment." Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) (holding school prayer directed by New York Board of Regents to be recited in every classroom on voluntary basis by students was violation of Establishment Clause). In support of the "wall of separation" theory as the intended meaning of the Establishment Clause, the Court extensively cited the speeches and writings of James Madison, Thomas Jefferson, and others. *Everson*, 330 U.S. at 11-13, 16. There are critics of what the Court claimed as the historical basis for its reasoning in *Everson*. *See, e.g.,* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 285-288 (2001) (asserting history used to support "separationist" theory in *Everson* was fantastical and not so much history of United States as that of Commonwealth of Virginia); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1160 (1991) (pointing out Court followed and discussed Madisonian and Jeffersonian ideas and beliefs about religious freedom yet failed to mention their very applicable ideas concerning federalism). *But see* Watson v. Jones, 80 U.S. 679, 728 (1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect . . . The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree.").

[21] *Everson,* 330 U.S. at 18. *See* Bell, *supra* note 18, at 1285 (emphasizing constitutionality of religious neutrality as "fundamental doctrinal approach" that emerged from *Everson*); *see also* Mitchell v. Helms, 530 U.S. 793, 816 (2000) (stating government aid must be "neutrally available"); Rosenberger v. Univ. of Va., 515 U.S. 819, 839 (1995) ("The governmental program . . . is neutral toward religion."); Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("The government must be

B. *Formulating the* Lemon *Test*

The Court in *Lemon v. Kurtzman* was faced with the obstacle of delineating Establishment Clause boundaries as it determined the constitutionality of two state programs that provided direct financial assistance to religious schools.[23] A Pennsylvania statute authorized reimbursements to nonpublic schools for various costs, and a Rhode Island statute allowed for a percentage of nonpublic teachers' salaries to be supplemented by the state.[24] The Supreme Court affirmed the holding of the Rhode Island District Court and reversed that of the Pennsylvania District Court, holding both statutes to be unconstitutional because they crossed the lines of permissible state involvement and entanglement with religion.[25] The

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neutral when it comes to competition between sects.").

[22] *Everson,* 330 U.S. at 18. *Cf.* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963) (citing *Everson* in establishing test to determine permissible State involvement with religion by considering "the purpose and the primary effect of the enactment . . . to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion").

[23] 403 U.S. 602 (1971).

[24] Lemon v. Kurtzman, 403 U.S. 602, 607 (1971). The Rhode Island statute had many stipulations including that teachers receiving the supplements had to teach "secular" subjects, i.e., "only those subjects that are offered in the State's public schools . . . [using] only teaching materials which are used in the public schools." *Lemon,* 403 U.S. at 608. Similarly, the Pennsylvania statute only allowed for the reimbursement of educational expenses deemed "secular," which included a list of state-approved "secular" subjects, and the statute maintained that the State had to approve all materials and texts used in the nonpublic schools that could potentially be reimbursed under the program. *Id.* at 610. The parties contesting the statutes were citizens and taxpayers of both states, and, in Pennsylvania, organizations devoted to the separation of church and state were also parties to the suit. *Id.* at 608, 611-12. Also, both states contended that the statutes addressed the educational needs of the states arising out of increased problems associated with nonpublic schools in the states. *Id.* at 607, 609.

[25] *Id.* at 625. The Court insisted, "while some involvement and entanglement are inevitable, *lines must be drawn.*" *Id.* (emphasis added). The Court also implied that the line is less than a wall and more of an unclear and imprecise barrier that is dependent upon the circumstances of the situation. *Id.* at 614. The Court in *Lemon* drew these lines of demarcation by adopting a uniform formula

Court reiterated three established tests in its opinion: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[26] The Court emphasized that the statutes promoted an entanglement of government and religion and were thus unconstitutional.[27]

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to be applied to Establishment Clause challenges. *See* Bell, *supra* note 18, at 1287.

[26] *Id.* at 612-13. The Court adopted the "excessive entanglement" prong from Walz v. Tax Comm'n, 397 U.S. 664, 667 (1970) and combined it with the already established "purpose and effect" test from Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968). *Id. See* Peter J. Weishaar, Comment, *School Choice Vouchers and the Establishment Clause*, 58 ALB. L. REV. 543, 548 (1994) (claiming test defined in *Lemon* was culmination of various criteria established in Court's previous Establishment Clause cases). This test has been commonly referred to as "the three-part *Lemon* test." LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 157 (1994). The author maintained that the Court has used the *Lemon* test to further the Court's initial interpretation in *Everson* yet it has failed to provide criteria that can be used to objectively evaluate Establishment Clause cases and reach an enduring interpretation. *Id.* at 157-58. For many years, the *Lemon* test served as the primary and exclusive means by which the Court evaluated Establishment Clause cases. WINNIFRED FALLERS SULLIVAN, PAYING THE WORDS EXTRA: RELIGIOUS DISCOURSE IN THE SUPREME COURT OF THE UNITED STATES 64 (1994). Another author pointed out that the *Lemon* test has remained integral in deciding Establishment Clause cases since its inception, yet despite its ubiquitous presence there are shortcomings in the test. Charles J. Russo and Ralph D. Mawdsley, *The Supreme Court and the Establishment Clause at the Dawn of the New Millennium: "Bristl[ing] with Hostility to All Things Religious" or Necessary Separation of Church and State?*, 2001 BYU EDUC. & L.J. 231, 234 (2001); *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n.7 (1993) ("*Lemon*, however frightening it might be to some, has not been overruled.").

[27] *Lemon,* 403 U.S. at 614. Commenting on how the statutory programs constituted an entangling of government and religion, Justice Douglas concluded that if the government "closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education . . . but [if it] undertook the surveillance needed, it would, I fear, intermeddle in parochial affairs in a way that would breed only rancor and dissension." *Id.* at 640 (Douglas, J., concurring). *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 761 (1973) (describing the "constitutional standards . . . [as] firmly rooted and the broad contours of our inquiry . . . well defined"). The Court in *Nyquist* used the established *Lemon* test and found New York tax laws providing various types of aid to nonpublic schools to be unconstitutional. *Nyquist*, 413 U.S. at 773-74, 798. The Court insisted that any challenge on the basis of

C. *Modifying* Lemon *and Moving Beyond*

In *Mueller v. Allen*,[28] the Supreme Court discussed the lack of clarity in the lineage of Establishment Clause cases in reaching its decision concerning a state statutory scheme that proffered a tax benefit to parents whose children attended parochial or private schools.[29] In *Mueller*, the State of Minnesota permitted taxpayers to deduct a certain amount of their children's educational costs at private, public or religiously affiliated schools with certain stipulations governing courses and materials related to religious indoctrination.[30] The Court concluded that Minnesota's tax deduction plan for educational costs of children passed the tripartite *Lemon* test and was constitutional.[31] The Court distinguished this case from oth-

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the Establishment Clause must be examined with careful precision and scrutiny with an inquiry into whether the challenged program supports the "evils" the Establishment Clause is meant to deter. *Id.* at 772. The Court has also upheld statutes as constitutional using the *Lemon* test. *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 648, 660 (1980) (upholding statute allowing religious schools to be reimbursed for certain state required tests and services); Tilton v. Richardson, 403 U.S. 672, 674-76 (1971) (permitting church-affiliated colleges and universities to receive federal grants for construction of certain facilities).

[28] 463 U.S. 388 (1983)

[29] Mueller v. Allen, 463 U.S. 388, 392-94 (1983). The Court explained that the notion that "any program which in some manner aids an institution with a religious affiliation" must be in violation of the Establishment Clause has been denied by the Court. *Mueller,* 463 U.S. at 393 (quoting Hunt v. McNair, 413 U.S. 734, 742 (1973)); *see also* Witters v. Wash. Dept. of Serv. for the Blind, 474 U.S. 481, 486 (1986) (stating that it has been well established in Court precedent that Establishment Clause violations do not arise every time "money previously in the possession of a State is conveyed to a religious institution.")

[30] *Mueller*, 463 U.S. at 391 n.1. Tax deductions were allowed to be made for certain items such as textbooks for "subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship . . . ." *Id.* at 391 n.1 (quoting MINN. STAT. § 290.09(22) (1982)). The fact that all Minnesota taxpayers with children in school, be it a public, private or religious school, could have benefited from this program was what distinguished it from other programs found unconstitutional. LEVY, *supra* note 26, at 169.

[31] *Mueller,* 463 U.S. at 395, 402-03. The Court noted that governmental assistance programs routinely passed the secular purpose portion of the test. *Id.* at 394; *see* Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985) (holding that there have

ers preceding it by pointing out that individual parents were given a private choice, and no public aid was given directly to religiously affiliated schools; therefore, the Court implied that "political divisiveness" would not flow from a situation of private choice such as the one in Minnesota.[32]

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rarely ever been disputes that arise about secular purpose test). The Court also held that the "primary effects" portion of the test was met for the same reasons advocated by Justice Powell: "Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools." *Mueller,* 463 U.S. at 401-02 (Powell, J., concurring and dissenting) (quoting Wolman v. Walter, 433 U.S. 229, 262 (1977)); *see also* Bowen v. Kendrick, 487 U.S. 589, 604 (1988) (noting that difficult primary effects inquiry was met in case in which Court upheld federal act providing funds to religious nonprofit agencies for sexual counseling to teenagers). Lastly, the Court held that there was no "excessive entanglement" between government and religion. *Mueller,* 463 U.S. at 403. In the same year as *Mueller*, the Court handed down an opinion in which it upheld the constitutionality of opening prayers in legislative sessions. Marsh v. Chambers, 463 U.S. 783, 793-95 (1983). *Marsh* was the first Establishment Clause case since *Lemon* in which the Court did not apply its three-prong test. *Marsh*, 463 U.S. at 793. A year later, there was an attempted modification of the *Lemon* test for the first time with Justice O'Connor's addition of an "endorsement test." Weishaar, *supra* note 26, at 556-58; *see also* Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (holding state statute authorizing moment of silence in schools to be endorsement of religion); Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) (stating that "focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device.")

[32] *Mueller,* 463 U.S. at 403 n.11. The Court pointed out that the "political divisiveness" inquiry had been incorporated into the third prong of the *Lemon* test concerning "excessive entanglement." *Id. See* Lynch, 465 U.S. at 684 (holding nativity scene in city's Christmas display did not violate Establishment Clause and that no inquiry into political divisiveness was necessary because there was no subsidy going directly to religious institution). The Court concluded, however, that this inquiry was only applicable to cases involving public aid going directly from a state to a religious school. *Mueller,* 463 U.S. at 403 n.11; *see also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13-14 (1993) (allowing federal program providing interpreters for deaf students to do so at parochial schools because program was neutral regarding religion and distributed aid to deaf students and not to religiously affiliated schools); Witters v. Wash. Dept. of Serv. for the Blind, 474 U.S. 481,488-89 (1986) (allowing state program providing financial assistance to blind persons to provide such assistance to blind student studying at religious college because aid was neutral and conveyed to student).

D. Tearing Down the Wall of Separation

In *Agostini v. Felton*,[33] the Supreme Court overruled previous cases as it reevaluated its prior stance on the presence of publicly paid educators working, under special circumstances, at nonpublic, religiously affiliated schools.[34] The petitioners in *Agostini* were the Board of Education of the City of New York and some parents of students at parochial schools entitled to Title I benefits.[35] They filed a motion seeking relief from an injunction prohibiting public school teachers from being sent to parochial schools to provide remedial education to children with learning disabilities.[36] The Court held that placing public school employees in religious schools does not necessarily "have the impermissible effect of advancing religion through indoctrination,"[37] and government-funded Title I programs "neither favor nor disfavor religion."[38]

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[33] 521 U.S. 203 (1997).

[34] Agostini v. Felton, 521 U.S. 203, 236. The Court in *Agostini* overruled the earlier cases of Aguilar v. Felton, 473 U.S. 402 (1985), and its companion case, Sch. Dist. v. Ball, 473 U.S. 373 (1985), "to the extent those decisions are inconsistent with our current understanding of the Establishment Clause." *Agostini*, 521 U.S. at 236. *Agostini* also "mark[ed] the demise of the *Lemon* test in Establishment Clause jurisprudence." RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 7 (Paul Finkelman ed., 2000); *see also* Bacon, *supra* note 13, at 363-64 (claiming *Agostini* "reworked the *Lemon* test" by combining "excessive entanglement" inquiry with "effect prong"). In a more recent case, some members of the Court argued that the Court improperly applied the *Lemon* test in light of its revisions in *Agostini*. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 320 (2000) (Rehnquist, C.J., dissenting) (dissenting in case in which majority found student led and student initiated prayers conducted before football games to be unconstitutional).

[35] *Agostini,* 521 U.S. at 214. This program involved Title I of the Elementary and Secondary Education Act of 1965, which was legislation passed with the goal to provide complete educational opportunities to all students. *Id.* at 210. There were a number of restrictions placed on "local educational agencies" providing this type of public aid to private schools including the stipulation that services offered under Title I had to be "secular, neutral, and nonideological." *Id.* This very same program was found unconstitutional using the "excessive entanglement" inquiry in *Aguilar*. *Id.* at 212.

[36] *Id.* at 213-14. The Court held that the petitioners were entitled to relief from the injunction under Rule 60(b)(5) if "a significant change in either factual conditions or in law" could be proven. *Id.* at 215 (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992)); *see* FED. R. CIV. P. 60(b)(5) ("[T]he court may relieve a party . . . from a final judgment . . . [w]hen it is no longer equitable that the judgment should have prospective application."). Because the Court found that its "more recent cases have undermined the assumptions upon which *Ball* and *Aguilar* relied," it granted relief to the petitioners. *Agostini*, 521 U.S. at 222; *see, e.g.,* Bd. of Educ. v. Grumet, 512 U.S. 687, 717, 750 (1994) (O'Connor, J., concurring) (Scalia, J., dissenting) (discussing Court's erroneous

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holding in *Aguilar* and calling for that decision to be overruled).

[37] *Agostini,* 521 U.S. at 230. The Court was split five to four, and Chief Justice Rehnquist with Justices O'Connor, Scalia, Kennedy and Thomas formed the majority; whereas, Justices Souter, Stevens, Ginsburg and Breyer dissented. *Id.* at 207. The Court in *Agostini* reworked the *Lemon* test into a two-part inquiry into the secular purpose of the program and the "effects" of the program, which included the former "entanglement" inquiry as well. Joseph Byrd, Comment, *Permissive School Vouchers in Ohio: Magic Pill or Placebo? An Analysis of the Federal Ohio Application of the* Lemon-Agostini *Test*, 32 U. TOL. L. REV. 563, 573 (2001). Justice Souter agreed, unlike the majority, with the decision in *Ball* that the "impermissible effect of promoting religion" could potentially manifest itself through the conveyance of a "symbolic union" leading people to believe that the government supported a particular religion. *Agostini,* 521 U.S. at 241 (Souter, J., dissenting). Justice Souter further urged that public teachers placed in a sectarian environment could involuntarily use public funds for religious purposes and that teaching those subjects religiously affiliated schools would normally have to provide for financially would constitute a promotion of religion on the part of the government. *Id.* at 241-42 (Souter, J., dissenting).

[38] *Agostini*, 521 U.S. at 232. The Court maintained this proposition because all children covered by the program were eligible for the services provided without regard to where they attended school or their religious faith. *Id.* In 2000, a case very similar to *Agostoni* arose challenging Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 (ESEA), which granted federal money to local school districts for the implementation of programs to assist students enrolled in both public and private school districts so long as the services and materials being provided were "secular, neutral, and not ideological." Mitchell v. Helms, 530 U.S. 793, 802 (2000). The Court held that the program did not violate the Establishment Clause using analysis provided by *Agostini. Helms,* 530 U.S. at 835. Justice Thomas further wrote that *Meek* and *Wolman* are overruled "[t]o the extent . . . [they] conflict with this holding." *Id. See* Wolman v. Walter, 433 U.S. 229, 254-55 (1977) (finding Ohio's subsidization of instructional materials and other services unconstitutional based on "excessive entanglement" of church and state relations); Meek v. Pittenger, 421 U.S. 349, 356, 372 (1975) (holding Pennsylvania statutes authorizing supply of instructional materials to nonpublic schools unconstitutional under Establishment Clause because of "potential for political entanglement . . . [and] administrative entanglement"). Though there was a six to three majority concurring in the judgment of *Helms*, the opinion written by Justice Thomas for the Court was only joined by a plurality. *Helms*, 530 U.S. at 801.

III. ZELMAN V. SIMMONS-HARRIS

A. Opinion of the Court

In *Zelman v. Simmons-Harris*,[39] the United States Supreme Court held that Ohio's Pilot Project Scholarship Program did not violate the Establishment Clause of the First Amendment because the program was completely neutral respecting religion, it allowed individual parents to make a valid private choice between both public and private schools irregardless of religious affiliation, and it benefited a large and varied segment of people with preference given only to those demonstrating true financial need.[40] The Court began its discussion by stating that the question to be determined was whether the challenged program "ha[d] the forbidden 'effect' of advancing or inhibiting religion" even though the legislative intent behind its enactment was for a purely secular purpose.[41]

The Court, citing precedent, stated that a public aid program with connections to a religiously affiliated institution is

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[39] 122 S. Ct. 2460 (2002).

[40] Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2473 (2002). Chief Justice Rehnquist delivered the Court's opinion, in which Justices O'Connor, Scalia, Kennedy and Thomas joined. *Zelman*, 122 S. Ct. at 2462. The Court concluded that this decision was "[i]n keeping with an unbroken line of decisions rejecting challenges to similar programs." *Id.* at 2473.

[41] *Id.* at 2465. The Court, citing *Agostini*, initially stated that the Establishment Clause, via the Fourteenth Amendment, prohibited states from passing legislation with the "purpose or effect of advancing or inhibiting religion." *Id.* The Court frequently pointed out throughout its opinion that the "valid secular purpose" of Ohio's program was to provide better educational opportunities for economically disadvantaged children in failing schools in Cleveland. *Id.* The Court summarized its case law on public aid to religious institutions and insisted that it clearly made a distinction between programs that gave aid directly to religiously affiliated schools and those which gave aid to parents who were given a bona fide private choice as to how they could spend the money. *Id.* The Court noted, however, that case law has "changed significantly" in regards to direct financial assistance to religiously affiliated programs by citing *Agostini* and *Helms*, yet it has been consistent with its rulings involving complete parental choice. *Zelman*, 122 S. Ct. at 2465-66. As support for the Court's contention that it has remained steadfast in its rulings on public aid to religiously affiliated institutions involving a genuine private choice, the Court discussed in depth the cases of *Mueller, Witters,* and *Zobrest*. *Id.* at 2466-68.

not automatically subject to an Establishment Clause challenge if it has the features of neutrality regarding religion, aid to a broad segment of people, and free and independent choices by those people the program is meant to assist.[42] The Court also argued that there were no economic incentives to persuade parents to choose religiously affiliated schools over public schools or other nonreligious private schools.[43] The Court stated that Cleveland offered a variety of educational options both in the public and private sector as well as in both religious and nonreligious schools, and the program did not encourage enrollment in religious schools or discourage enrollment in public or nonreligious private schools.[44]

The Court dismissed the respondents' insistence that the claim should be evaluated according to *Nyquist*.[45] In this matter, the Court stated, "*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion."[46]

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[42] *Id.* at 2467. "[W]hen government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, 'no reasonable observer is likely to draw . . . an inference that the State itself is endorsing a religious practice or beliefs." *Id.* (citation omitted).

[43] *Id.* at 2468. The Court contended that the program actually created disincentives for attendance at religiously affiliated schools because those schools only received a fraction of the money given to support public and community magnet schools. *Id.* The Court also pointed out that parents still had to pay a portion of private school education, but parents would not have to pay anything at public schools. *Id.*

[44] *Id.* at 2469. The Court pointed to the fact that public school children could remain in their original public schools with the opportunity to receive state-funded tutorial assistance or they could attend public community or magnet schools as alternatives to regular public education. *Id.* at 2469. Also, the Court insisted that the abundance of religiously affiliated private schools in the Cleveland area had absolutely nothing to do with the program, and, therefore, should not be used as an argument that the program in someway encouraged parents to choose a religious education for their children at the expense of taxpayers. *Id.* at 2470. The Court further contended that if such an argument were allowed to stand, then a program such as Ohio's could be constitutionally permissible if it were enacted in a state or location where the prevalence of religiously affiliated private schools was lower and not be allowed in states or locations where religiously affiliated private schools were in the majority. *Id.* The Court also rejected the claim that because over ninety-six percent of those parents using tuition assistance grants did so at religious schools was evidence alone that parents did not truly have a genuine choice. *Zelman,* 122 S. Ct. at 2470. The Court claimed this issue was resolved earlier by the Court in *Mueller* and reiterated again in *Agostini. Id.*

[45] *Zelman,* 122 S. Ct. at 2472. The Court contended that there was an evident difference between the Ohio program and the one in *Nyquist* because the program in *Nyquist* provided monies from the State directly to religious schools and did

B. Justice O'Connor's Concurring Opinion

Justice O'Connor concurred in the *Zelman* decision and noted that she did so because she did not believe that the Court's decision "mark[ed] a dramatic break from the past" and she expanded the Court's discussion on the various alternatives available to parents in Cleveland.[47] Justice O'Connor contended that if publicly supported community and magnet schools were considered in the evaluation, the percentage of students cited as enrolled in religious schools and the statistics tabulating the amount of money going to private schools in relation to public schools would be greatly reduced.[48] Even though Justice O'Connor acknowledged that the money flowing to religious schools via Ohio's program was substantial, she maintained that the substantiality of the amount lessens

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not include participation with other private schools or any public schools. *Id.* The Court also pointed out that they reserved judgment in *Nyquist* for a case involving state aid "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.* (citation omitted).

[46] *Id.* at 2472. The Court, citing its plurality opinion in *Helms*, summarily rejected Justice Breyer's argument that "divisiveness" and "religious strife" should demand that the program be unconstitutional. *Id.* at 2472 n.7. Rather, the Court stated that the "speculative potential for divisiveness" had no relevance to the constitutionality of school voucher programs such as the one challenged. *Id.* at 2472 n.7.

[47] *Id.* at 2473 (O'Connor, J., concurring). Justice O'Connor agreed that the Court took "an important step" in its decision in *Zelman*, and she insisted that not discussing further the alternatives available in Cleveland overlooked the overall functioning of the educational system in the city. *Id.* (O'Connor, J., concurring).

[48] *Id.* at 2473 (O'Connor, J., concurring). "When one considers the option to attend community schools, the percentage of students enrolled in religious schools falls to 62.1 percent . . . [with] magnet schools . . . this percentage falls to 16.5 percent." *Id.* (O'Connor, J., concurring). She also pointed out that $8.2 million was the maximum amount of public money going to religious schools, whereas, $9.4 million was going to community schools with approximately half as many students and $114 million was being spent on the magnet schools. *Id.* at 2473-74. (O'Connor, J., concurring).

when compared to other governmental programs and incentives allowing public funds to flow to religiously affiliated institutions.[49] Justice O'Connor asserted in her second main point that even though Establishment Clause jurisprudence has been refined through the caselaw over the years, the Court did not completely reject its roots but allowed for adaptation and the inclusion of other possibilities.[50]

C. Justice Thomas' Concurring Opinion

Justice Thomas concurred in *Zelman*, but questioned whether the states should even be subject to an Establishment Clause inquiry.[51] Justice Thomas argued that rights "incorporated against the States through the Fourteenth Amendment . . . should advance, not constrain, individual liberty."[52]

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[49] *Id.* at 2474 (O'Connor, J., concurring). Justice O'Connor noted a host of examples including exemptions from federal and some state corporate income tax, exemption from property taxes in all states, tax breaks for clergy's housing expenditures, tax deductions for charitable contributions to religious organizations, and permissible tax credits for educational expenses at religiously affiliated schools. *Id.* (O'Connor, J., concurring). Also mentioned was the significant amount of money flowing to religiously affiliated institutions, programs, and organizations through social welfare programs including Medicare and Medicaid as well as the Federal Pell Grant Program. *Id.* at 2475 (O'Connor, J., concurring).

[50] *Zelman,* 122 S. Ct. at 2476 (O'Connor, J., concurring). Justice O'Connor briefly summarized the Court's Establishment Clause jurisprudence beginning with *Lemon* and its stages of evolution through *Agostini. Id.* (O'Connor, J., concurring). Justice O'Connor insisted that the Court's established tests have only been revised in light of new circumstances such as the one presented in the Ohio school voucher program involving the flow of public assistance to religious institutions by the individual choices of the beneficiaries of the assistance. *Id.* at 2476 (O'Connor, J., concurring). Justice O'Connor stipulated that the Court's "refinement of the *Lemon* test" was in no way a betrayal of the principles established by the Court in *Everson. Id.* (O'Connor, J., concurring).

[51] *Id.* at 2480-81. (Thomas, J., concurring). Justice Thomas pointed out that the Establishment Clause of the First Amendment itself places no restrictions or limitations on the states regarding religion, therefore, as an interpretive matter Justice Thomas does not believe that there is a constitutional limitation on states barring establishment. *Id.* at 2481 (Thomas, J., concurring).

[52] *Id.* at 2481 (Thomas, J., concurring). Justice Thomas referred to several other former Justices who concur with his assertion that the Fourteenth Amendment's incorporated rights apply differently to the states than to the Federal Government. *Id.* at 2481 n.3 (Thomas, J., concurring). Justice Thomas advocated the idea that the Constitution permits states to have more neutral involvement with religion than it does the federal government. *Id.* at 2481 (Thomas, J.,

Additionally, Justice Thomas contended that the respondents' successful use of the Fourteenth Amendment to challenge the Ohio program would, in effect, only serve to deny the beneficiaries of the program the very rights and freedoms the Fourteenth Amendment was meant to provide and preserve.[53] In conclusion, Justice Thomas discussed how the idyllic hopes of better and more egalitarian educational opportunities, which spawned the movement for mass public education, have yet to come to fruition in America's inner-city public schools.[54] As a result, Justice Thomas argued that the failures long plaguing certain public school systems have resulted in social ills that continually pervade a large segment of the population and will not be changed unless alternative programs such as the one challenged in Ohio are allowed to be implemented.[55]

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concurring). Justice Thomas warned of the attempt to transform the Fourteenth Amendment as a vehicle for the "guarantees of individual liberty" into a means by which to place strict limitations on educational choice. *Id.* at 2482 (Thomas, J., concurring). Justice Thomas stated that though he has accepted the historical incorporation of the Establishment Clause into the Fourteenth Amendment, he has not accepted that religious liberty rights are protected by the Fourteenth Amendment. *Zelman*, 122 S. Ct. at 2482. (Thomas, J., concurring).

[53] *Id.* at 2482 (Thomas, J., concurring). Justice Thomas stated that the Ohio program merely gave economically disadvantaged parents the "choice that those with greater means have routinely exercised." *Id.* (Thomas, J., concurring). Justice Thomas also pointed out that the Court has held that parents have a fundamental right to decide what type of education their child shall receive. *Id.* at 2482 n.5 (Thomas, J., concurring).

[54] *Id.* at 2483 (Thomas, J., concurring). Justice Thomas specifically pointed out that minorities are disproportionately impacted by the failings of inner-city public schools. *Id.* (Thomas, J., concurring). Justice Thomas also claimed that low-income parents, especially minority ones, are more supportive of school choice options and are more apt to place their children in private schools. *Id.* at 2483 n.7 (Thomas, J., concurring).

[55] *Zelman*, 122 S. Ct. at 2483-84 (Thomas, J., concurring). "The failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives," stated Justice Thomas in his opinion. *Id.* (Thomas, J., concurring). Also, Justice Thomas explained that school choice programs actually addressed a need around the country and provided an alternative to failing public schools. *Id.* at 2484 (Thomas, J., concurring). Justice Thomas mentioned ten states with a type of state funded private school choice, usually in the form of tax credits, and he noted that thirty-seven states have enacted laws establishing charter schools. *Id.* at 2484, 2484 n.9 (Thomas, J., concurring).

D. Justice Stevens' Dissenting Opinion

Justice Stevens dissented in the *Zelman* decision and stressed that much of what the Court addressed had little to do with ascertaining the constitutionality of the Ohio program being challenged.[56] Justice Stevens claimed that the failings of the Cleveland school system should have had no bearing on the constitutionality of the State's program especially considering the fact that the program was applicable to less than five percent of the students in the school district.[57] Justice Stevens also maintained that the number of alternatives available within the public school system had nothing to do with the Establishment Clause problem facing the Court.[58] Justice Stevens did not believe that the matter of genuine private choice by families to send their children to religiously affiliated schools at state expense made it acceptable for the government to pay for a religious education amounting to religious indoctrination.[59] Justice Stevens concluded his dissent by stating, "[w]henever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."[60]

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[56] *Id.* at 2484 (Stevens, J., dissenting). Justice Stevens penned his version of the question presented: "Is a law that authorizes the use of public funds to pay for the indoctrination of thousands of grammar school children in particular religious faiths a 'law respecting an establishment of religion' within the meaning of the First Amendment?" *Id.* (Stevens, J., dissenting).

[57] *Id.* at 2484 (Stevens, J., dissenting). Justice Stevens further pointed out that more widespread improvements have to be implemented to actually help alleviate the problems facing a school system in which more than ninety percent of its students failed to meet minimal state skills requirements. *Id.* (Stevens, J., dissenting).

[58] *Id.* at 2484-85 (Stevens, J., dissenting). Justice Stevens argued that the Establishment Clause problem facing the Court was that a state was financially supporting the "religious indoctrination" of an overwhelming number of persons receiving vouchers who declined all public educational opportunities available. *Id.* (Stevens, J., dissenting). Justice Stevens strongly emphasized his contention that states are required to provide all students a public education, and the glaring problem was the fact that Ohio had chosen to subsidize private education instead of providing adequate public education. *Id.* at 2485 (Stevens, J., dissenting).

[59] *Zelman,* 122 S. Ct. at 2485 (Stevens, J. dissenting). The fact that families desired for their children to have a religious education yet were unable to afford it was not a sufficient justification for Ohio's financing of religious indoctrination. *Id.* (Stevens, J., dissenting).

E. Justice Souter's Dissenting Opinion

Justice Souter dissented in the *Zelman* decision and insisted that the Court depleted the power of the Establishment Clause and went beyond the bounds of the constitutional limitations necessary for the safeguarding of those values the Constitution represents.[61] Justice Souter also condemned the Court for professing to uphold Establishment Clause jurisprudence established by the Court yet in application completely ignoring the foundations of Establishment Clause law pertaining to private choice and neutrality.[62] Justice Souter argued that the majority concluded the program met the neutrality and free choice standards by erroneously including all public schools in their computations.[63] Justice Souter further contended that if "choice" continues to be as expansive as the majority accepted, those supporting the public aiding of religious education will always prevail because it can always be proven that more public money is spent on public schools than on private.[64]

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[60] *Id.* at 2485 (Stevens, J., dissenting). Justice Stevens discussed the plight of those coming to this country due to religious strife in their homelands and those experiencing the horrors of religious strife presently in countries throughout the world as a great influence on his opinion. *Id.* (Stevens, J., dissenting).

[61] *Id.* at 2485, 2502 (Souter, J., dissenting). Justices Stevens, Ginsburg and Breyer joined in Justice Souter's dissenting opinion. *Id.* at 2485 (Souter, J., dissenting). "[C]onstitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government." *Id.* (Souter, J., dissenting) (citation omitted).

[62] *Id.* at 2486 (Souter, J., dissenting). Justice Souter maintained that the Court turned its back entirely on *Everson*, and the Court's reliance upon private choice and neutrality to support its opinion was only achieved by misconstruing those concepts. *Id.* (Souter, J., dissenting). Justice Souter recited a thorough history of Establishment Clause cases pertaining to educational aid in attempting to prove his point about the Court's misapplication of Establishment Clause doctrine. *Id.* at 2486-90 (Souter, J., dissenting).

[63] *Id.* at 2491-92 (Souter, J., dissenting). By considering the participation of all public schools within and adjacent to the district, the Court made the argument that neutrality was met because most government funds went to the public school system. *Id.* at 2491 (Souter, J., dissenting). Justice Souter refuted the contention that neutrality was satisfied by pointing to the fact that those under the program who chose to stay in public school were allotted no more than $324 to subsidize tutorial assistance, but those who chose to attend a private school received up to $2250. *Id.* (Souter, J., dissenting). On the matter of private choice, Justice Souter insisted that the Court "confused choice in spending scholarships with choice from the entire menu of possible educational placements, most of

Justice Souter explained that even if the majority could prevail using their own misguided criteria, the opinion of the Court would still remain a violation of the Constitution.[65] First, Justice Souter discussed the enormity of the voucher program by pointing out that since the Ohio program's inception in 1996, the costs to Ohio were in excess of $30 million as of 2001 not including funds for other additional materials and resources.[66] Second, Justice Souter explained how the program upheld by the majority violated the early goals of re-

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them open to anyone willing to attend a public school." *Id.* at 2492 (Souter, J., dissenting).

[64] *Zelman,* 122 S. Ct. at 2493 (Souter, J., dissenting). Justice Souter also noted that even the "showcase" options presented by the Court, such as community schools, did not provide much of a choice either. *Id.* at 2494 n.10 (Souter, J., dissenting). Justice Souter acknowledged that of the ten community schools in Cleveland only six were available to all students and of those six only one was actually an "arguable competitor" when comparing fourth grade basic skills tests. *Id.* (Souter, J., dissenting). Justice Souter further argued that the nonreligious private schools participating in the program were only able to accommodate a few more than the minimal number of program students already enrolled and the $2500 tuition grant was less likely to cover the cost of a nonreligious private school, thus no real choice was available in the private school option either. *Id.* at 2495 (Souter, J., dissenting).

[65] *Id.* at 2497 (Souter, J., dissenting). Justice Souter attempted to prove his point by discussing the substantiality of the public assistance going to support religious education and the majority's disregard for the Establishment Clause's existence. *Id.* (Souter, J., dissenting). Justice Souter adamantly proposed that the fact that over ninety-six percent of voucher recipients chose to use them at religious schools was evidence enough of a lack of true choice. *Id.* at 2496-97 (Souter, J., dissenting). Justice Souter stated that it should have been irrelevant in the Court's analysis as to whether the State of Ohio intentionally designed a program for the sake of conveying public financial assistance to religiously affiliated institutions. *Id.* at 2497 (Souter, J., dissenting).

[66] *Id.* at 2498 (Souter, J., dissenting). "The scale of aid to religious schools approved today is unprecedented . . . ," stated Justice Souter while insisting that the substantial amount of money flowing to religiously affiliated schools under the Ohio program was what should have been of primary concern in assessing the constitutionality of the school voucher program. *Id.* at 2497 (Souter, J., dissenting).

specting "freedom of conscience" and "sav[ing] religion from its own corruption."[67]

F. Justice Breyer's Dissenting Opinion

Justice Breyer dissented separately in *Zelman* specifically to discuss the possibility of social conflict that could emerge from state-funded tuition assistance grants that can be used at schools proclaiming adherence to particular religious creeds and tenets.[68] Justice Breyer also discussed that "separation" is necessary because "equal opportunity" is not possible in a society as ethnically and religiously diverse as the United States in the twenty-first century.[69] Lastly, Justice Breyer argued that Ohio's program was much different than other programs upheld in the past in which public aid flowed to religious institutions.[70] Justice Breyer stated that the public financing of a religiously affiliated school for just materials and transportation is far less likely to incite social conflict than the funding of the education of children at schools dedicated and committed to the goal of teaching not only secular education but faith, devotion and religious doctrines and values as well.[71]

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[67] *Id.* at 2499 (Souter, J., dissenting). Justice Souter contended that the safeguarding of "liberty of conscience" was likely the primary force driving the creation of the Establishment Clause especially in the minds of Jefferson and Madison. *Id.* (Souter, J., dissenting). Justice Souter argued that finding the Ohio school voucher program unconstitutional would essentially be a means of "sav[ing] religion from its own corruption" because he feared that with the flow of government money to religious institutions would come government regulation which could lead to government oppression and suppression of religion. *Id.* (Souter, J., dissenting). Justice Souter noted to many potential problems that could arise from governmental regulation of private schools participating in the Ohio program. *Id.* at 2500 (Souter, J., dissenting). These problems include a possible ban on religious schools "from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others" because it would be contrary to the program's restriction that "[t]he school . . . not . . . teach hatred of any person or group on the basis of . . . religion." *Zelman,* 122 S. Ct. at 2500 (Souter, J., dissenting) (citation omitted). Justice Souter praised the legacy of *Everson*, and, in his concluding statement, requested that the decision be reconsidered at a later date because it stands as a "dramatic departure from basic Establishment Clause principles." *Id.* at 2502. (Souter, J., dissenting).

[68] *Id.* at 2502 (Breyer, J., dissenting). Justices Stevens and Souter joined Justice Breyer's dissenting opinion. *Id.* (Breyer, J., dissenting). Justice Breyer maintained that the Framers insisted upon an Establishment Clause to rid the new nation of the religious strife that had been a source of dissension for so long in Europe. *Id.* (Breyer, J., dissenting). Justice Breyer cited several twentieth century Supreme Court cases involving the Establishment Clause that specifically addressed the social conflict inevitably arising out of the intertwining of religion and government. *Id.* at 2502-03 (Breyer, J., dissenting).

[69] *Zelman,* 122 S. Ct. at 2504 (Breyer, J., dissenting). Justice Breyer discussed that criteria and restrictions are necessary for a functioning school voucher program, and proposed that deciding upon the criteria and restrictions to be placed upon the religious schools participating in such a voucher program is what will create divisiveness and tension among various religious sects and will seriously

IV. DISCUSSION

In *Zelman v. Simmons-Harris*, the United States Supreme Court modified and reiterated existing precedent concerning challenges based on the Establishment Clause by, in practice, applying an inquiry into the neutrality of the government's action respecting religion and the private choice afforded to the beneficiaries of a school voucher program.[72] Though the Court proclaimed adherence to its past caselaw, it is clear that the decision represents a new era in Establishment Clause jurisprudence and a departure from the strict "separationist" philosophy identified by the Court in the genesis of Establish-

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"entangle" church and state relations. *Id.* at 2506 (Breyer, J., dissenting).

[70] *Id.* at 2507 (Breyer, J., dissenting). Justice Breyer believed that Ohio's school voucher program differed "in both *kind* and *degree*" from past programs because it involved the direct financial subsidization of "the teaching of religious truths to young children." *Id.* (Breyer, J., dissenting). Justice Breyer noted the various missions and visions of some of the religious schools participating in the program, which included the goals of instructing students in religious truths and values, "communicat[ing] the gospel," teaching students the value of prayer, and "experience[ing] a faith community." *Id.* (Breyer, J., dissenting).

[71] *Id.* at 2507 (Breyer, J., dissenting). After writing about the diversity and heterogeneity of American society, Justice Souter remarked, "I fear that this present departure from the Court's earlier understanding risks creating a form of religiously based conflict potentially harmful to the Nation's social fabric." *Id.* at 2508 (Breyer, J., dissenting).

[72] *See supra* notes 11, 21, 37 and accompanying text. The Court in *Zelman* clearly made an effort to distinguish between government programs that give funds directly to religious institutions and those that give funds to recipients who may choose to support religious institutions. *See supra* notes 32, 41, 45 and accompanying text.

ment Clause law.[73] The Court's decision reveals a significant adherence to more recent Court decisions that are indicative of a gradual progression toward the ruling in *Zelman,* and the decision is representative of the Court's attempt to solidify its position and redirect the future of Establishment Clause doctrine in an effort to overcome decades of confusion and ambiguity.[74]

The Court's reasoning and holding in *Zelman* could potentially have profound effects on public and private education in America and on the delicate relationship between church and state in American society.[75] The Court has interpreted a less divisive "wall separating church and state" and allowed for the possibility of more interconnectedness between church and state relations.[76] The Court failed to discuss any potential negative repercussions that may emanate from its decision, with the most important among these being the potential for enormous government regulation and infiltration in the affairs of religious bodies that could inhibit religious exercise and expression.[77] Nevertheless, *Zelman* exhibited the Court's first official approval of a school voucher program and the Court's willingness to accept the substantial governmental involvement with religious schools inherent in such a program so long as a secular purpose, neutrality and private choice are present.[78]

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[73] *See supra* notes 18, 41, 50, 71 and accompanying text. Though the Court may not have turned its back on the seminal cases in Establishment Clause law, *Zelman* definitely marked a milestone in the law regarding the use of public funds flowing to religiously affiliated institutions. *See supra* notes 47, 62, 71 and accompanying text.

[74] *See supra* notes 13, 25, 50 and accompanying text. A line of cases beginning with *Mueller* that concerned constitutional challenges to the conveyance of public financial assistance to religious institutions greatly influenced the Court's decision in *Zelman. See supra* notes 41, 45, 70 and accompanying text.

[75] *See supra* notes 53, 55, 60, 71 and accompanying text. There are some who would contend that education might be substantially benefited by the inclusion of parochial schools as an educational alternative for students at failing public schools. *See supra* notes 31, 55 and accompanying text.

[76] *See supra* notes 19, 20, 50 and accompanying text. Essentially the boundaries of the Establishment Clause have been expanded because the majority of the Court today is much more receptive to the idea of heightened relations between church and state, which is a marked departure from the "strict separationist" approach adopted by the Court in the formative years of inquiries involving Establishment Clause challenges. *See supra* notes 13, 19, 52 and accompanying text.

[77] *See supra* notes 27, 67-69 and accompanying text. The government regulation, intervention and control that are inherent in school voucher programs like the Ohio one could, in some cases, inhibit the free exercise and expression of religion in participating religious schools. *See supra* notes 31, 67, 69 and accom-

V. CONCLUSION

Zelman v. Simmons-Harris provides the constitutional backing for the implementation of school voucher programs as a means to provide alternatives in education to low-income students attending school in districts that are continually among those designated as failing public schools. The essential criteria emphasized in *Zelman* as necessary for a program providing public assistance to a religiously affiliated institution are that the program be neutral in regards to religion in such a way that it neither "inhibits [n]or advances" religion and that the use of such funds by religious institutions be a result of genuine private choice and not a direct subsidization by the state. The Court's opinion in *Zelman* conveys a message by the Court that the strict separationist approach to church and state relations is no longer the judicial philosophy adopted by the majority of the Court. Though only the future holds the answer to whether *Zelman* marks the beginning of even more judicial deconstruction of the ban on establishment, it is inevitable that many programs will arise in *Zelman's* aftermath, and, of those, at least one will make it to the Supreme Court and force the Court to yet again further define Establishment Clause jurisprudence.

Corey D. Hinshaw

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panying text.

[78] *See supra* notes 1, 11, 40 and accompanying text. The program in *Zelman* prevailed despite the fact that over ninety-six percent of the participating students enrolled in religious schools, and, as a result, the door is now open wide for initiatives and programs to come about which involve substantial financial subsidizations of religious institutions under the guise of private choices made by the beneficiaries. *See supra* notes 44, 65 and accompanying text.

Constitutional Law—Sixth Amendment—Right to Counsel—Uncounseled, Indigent Misdemeanants No Longer Stand Alone When Facing a Suspended Sentence to Imprisonment

I. FACTS

LeReed Shelton was involved in a fist-fight occurring after a minor traffic accident.[1] Shelton appeared *pro se* in a bench trial in the District Court of Etowah County, Alabama, was convicted and invoked his right to a new trial before a jury.[2] The circuit court sentenced Shelton to thirty days in county prison, but the trial court suspended the sentence and ordered two years probation.[3] Shelton appealed to the Alabama Court of Criminal Appeals based on an alleged Sixth Amendment violation claiming he was entitled to legal representation at trial.[4] The appeals court opined that Shelton had not been denied his Sixth Amendment right since he remained on probation and was never incarcerated.[5] The Supreme Court of

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[1] Alabama v. Shelton, 122 S. Ct. 1764, 1774 n.10 (2002). The altercation resulted in what Alabama considers a "Class A" misdemeanor, which carries a maximum penalty of one year imprisonment and a $2000 fine. Ala. Code § 13A-6-22 (1975).

[2] *Shelton*, 122 S. Ct. at 1768. Before a jury in state circuit court, Shelton appeared without assistance of legal counsel, and again was convicted of the charges. *Id.* The circuit judge "repeatedly warned Shelton about the problems self-representation entailed . . . but at no time offered him assistance of counsel at state expense." *Id.*

[3] *Id.* Shelton was originally sentenced to thirty days imprisonment, restitution to the victim in the amount of $516.69, a $500 fine and court costs. *Id.* The trial court suspended the thirty day imprisonment, imposing probation contingent on timely payments of the monetary punishment. *Id.*

[4] *Id.* The defendant, Shelton, also appealed on other grounds, but the Alabama Court of Criminal Appeals dismissed all of the claims except one, which the court remanded for further determination. *Id.* n.1. Ultimately, the charge was affirmed in the state's favor, and only the Sixth Amendment claim remained for adjudication. *Id.* at 1768.

[5] Shelton v. State, No. CR-97-1313, 1998 WL 678088, at *2 (Ala. Crim. App. Oct. 2, 1998). The Alabama Court of Criminal Appeals initially held that an indigent defendant who receives a suspended sentence has a constitutional right to state-appointed counsel, and remanded the case to decide whether Shelton had made a "knowing, intelligent, and voluntary waiver of his right." *Shelton*, 1998 WL 678088, at *2. However, when the case returned from remand, the court fundamentally changed course by holding that "[u]nless an appellant has actually suffered a deprivation of liberty, there is no Sixth Amendment right to counsel in

Alabama disagreed, reversing the suspended sentence and vacating the two-year term of probation.[6] The United States Supreme Court granted the state's petition for certiorari and held: affirmed.[7] Where a criminal defendant receives a suspended sentence that may result in the deprivation of liberty, the defendant has a constitutional right to counsel in the prosecution of the crime charged.[8]

II. RELATED LAW

The Sixth Amendment of the United States Constitution requires federal courts to provide appointed counsel for criminal defendants.[9] A half century of Supreme Court jurispru-

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a misdemeanor prosecution in which a sentence was suspended." Shelton v. State, No. CR-97-1313, 1999 WL 339284, at *3 (Ala. Crim. App. May 28, 1999). Shelton appealed the decision to the Alabama Supreme Court. *Shelton*, 122 S. Ct. at 1768.

[6] Ex parte Shelton, No. 1990031, 2000 WL 1602806, at *4 (Ala. May 19, 2000). The Alabama Supreme Court's decision hinged on whether a suspended sentence constituted a "term of imprisonment." *Ex parte Shelton*, 2000 WL 1602806, at *4. Justice Johnstone decided that the mere fact that a suspended sentence does not pose an immediate possibility of incarceration does not shelter it from this characterization. *Id.* Since the State of Alabama was constitutionally prevented from activating the sentence, the court concluded, "the threat itself is hollow and should be considered a nullity." *Id.* (internal citations and quotation marks omitted). Justice Maddox of the Alabama Supreme Court dissented in the opinion, contending that Shelton was not entitled to state-appointed counsel because he had not been incarcerated. *Id.* at *6 (Maddox, J., dissenting).

[7] *Shelton*, 122 S. Ct. at 1767. The case was decided on May 20, 2002, with Justice Ginsburg delivering the opinion of the court. *Id.* Justice Scalia filed a dissenting opinion, in which the Chief Justice, and Justices Kennedy and Thomas joined. *Id.*

[8] *Id.* at 1776. The Court's opinion primarily addressed the Sixth Amendment right to counsel issue, concluding the Alabama Supreme Court's decision was correct that Shelton's constitutional right had been violated. *Id.* The Court admittedly resolved the division between the various circuit courts on the question presented. *Id.* With respect to the ultimate punishment, Shelton's conviction was affirmed, but his thirty days suspended sentence was vacated. *Id.*

[9] U.S. CONST. amend. VI (stating "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"). The Sixth Amendment of the Constitution "protects a large number of rights: the right to a speedy and public trial, the right to trial by an impartial jury, the right to be tried in the state and district where the offense was committed, the right to be informed of the charge, the right to confront adverse witnesses, the right to compulsory process for obtaining witnesses in the accused's favor, and the right to the assistance of counsel." Frank Turkheimer, *Globalization Of U.S. Law Enforce-*

dence has evolved to essentially extend the constitutional right to state court criminal proceedings through operation of the Fourteenth Amendment's Due Process Clause.[10] This section examines the legal precedents leading up to the United States Supreme Court's decision that a suspended sentence for a misdemeanor is an "actual deprivation of liberty" which requires state-provided counsel.[11]

A. Evolution of the Sixth Amendment Right to Counsel

In *Powell v. Alabama*,[12] the Supreme Court considered whether a due process fundamental right existed to provide court appointed counsel to indigent defendants.[13] In *Powell*, after pleading "not guilty," four indigent, African-American defendants were sentenced to death for the rape of two Caucasian women that occurred on a railroad car.[14] The Court

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ment: Does The Constitution Come Along?, 39 HOUS. L. REV. 307, 351 (2002).

[10] *See* Brad Kolling, *Waiver of the Sixth Amendment Right to Counsel: The North Dakota Supreme Court Rules That a Knowing and Intelligent Waiver Requires Awareness of Dangers and Disadvantages of Self-Representation*, 75 N.D. L. REV. 921, 930 (1998) (surveying Supreme Court precedents concluding that some rights are made obligatory upon states through Fourteenth Amendment operation). The applicable portion of the Fourteenth Amendment provides "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

[11] For further background information on the development of Sixth Amendment law in both the state and federal contexts, including less prominent decisions, see J.P. Ludington, *Constitutionally Protected Right of Indigent Accused to Appointment of Counsel in State Court Prosecution*, 93 A.L.R. 2D 747, 747-55 (2001). *See also* Thomas F. Liotti, *Does Gideon Still Make a Difference?*, 2 N.Y. CITY L. REV. 105, 107-10 (1998).

[12] 287 U.S. 45 (1932).

[13] Powell v. Alabama, 287 U.S. 45, 50 (1932). The *Powell* Court was among the first to recognize a fundamental right to counsel and was also one of the first to recognize the Fourteenth Amendment's role in application of the Sixth Amendment in state court actions. *Powell*, 287 U.S. at 71. The issue was not debated again for ten years until *Betts v. Brady*, 316 U.S. 455 (1942), *rev'd*, 372 U.S. 335 (1963) (deciding negatively that Fourteenth Amendment protection provides for counsel in all circumstances).

[14] *Powell*, 287 U.S. at 50. The facts further show that when the train arrived at the station, the Scottsboro, Alabama Sheriff's "posse" called in the local militia to handle and detain the suspects. *Id.* at 51. The four defendants were young

held that in some cases, such as the instant situation, due process protections ensure the assistance of counsel and the right to be heard because the state court must provide a fair trial.[15] In addition, Justice Sutherland plainly expressed the Court's disposition by stating the "right to the aid of counsel is of . . . fundamental character."[16] The Court reasoned that because the defendants were ignorant, illiterate and "stood in the deadly peril of their lives," the conviction was unfair and could not stand because it was offensive to the Constitution.[17]

B. Constitutional Provision Extended to State Courts

In 1963, *Gideon v. Wainwright*[18] addressed whether an

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men, approximately the age of nineteen-years-old, and none were natives of Alabama. *Id.* at 52. Testimony later revealed that no lawyer or representative had been confirmed or named until the day of trial. *Id.* at 56.

[15] *Id.* at 71. The Court qualified the scope of the holding specifically stating, "[w]hether this [result] would be so in other criminal prosecutions, or under other circumstances, we need not determine." *Id.* "[W]e do decide . . . that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court . . . to assign counsel for him as a necessary requisite of due process of law . . . ." *Id.*

[16] *Id.* at 73. The modern implications of this statement were exemplified when the Supreme Court stated that *Powell* requires "[scrutiny] . . . to determine whether the presence of . . . counsel is necessary to preserve the defendant's basic right to a fair trial." Coleman v. Alabama, 399 U.S. 1, 7 (1970) (quoting favorably U.S. v. Wade, 388 U.S. 218, 226 (1967)). Six years after *Powell*, the Court in *Johnson v. Zerbst* used the *Powell* holding as a basis to decide that the Sixth Amendment contained the right to counsel for criminal defendants in federal court. 304 U.S. 458, 463 (1938). The *Zerbst* case is considered a landmark in development of Sixth Amendment law in its own right, as the decision implicated incorporation of the right to counsel. *Zerbst*, 304 U.S. at 467.

[17] *Powell*, 287 U.S. at 69. The Court used the "fundamental fairness" approach, which focuses on the constitutional guarantee of a fair trial, and presupposed that counsel was imperative to receiving a fair trial. *Id.* The fact that the defendants were illiterate played a considerable role in the Court's reasoning. *Id.* at 71. This philosophy is corroborated in the Court's statement that the right to be heard would be "of little avail if it did not comprehend the right to be heard by counsel." Erin O'Connell, Nichols v. U.S.: *Prison Terms for Prior Offenses Without the "Guided Hand" or Counsel*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 361, 377 (1996) (discussing *Powell's* justification in reference to development of Sixth Amendment jurisprudence leading up to *Nichols v. U.S.*, 114 S. Ct. 1921 (1994)).

[18] 372 U.S. 335, 344 (1963).

indigent defendant in a criminal case specifically has the fundamental right to counsel in state court proceedings.[19] In *Gideon*, an indigent man was charged with breaking and entering into a pool hall with the intent to commit a misdemeanor, and then appeared in Florida court where his request for court appointed counsel was denied.[20] The Supreme Court forged new territory by deciding that the fundamental rights binding on the states by the Fourteenth Amendment include the right to counsel.[21] The Court reasoned that a defendant cannot receive a fair trial unless an attorney is provided; therefore, the concept that a criminal defendant has the right to state appointed counsel was deemed necessary to effectuate the protections governing state actions.[22]

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[19] Gideon v. Wainwright, 372 U.S. 335, 336 (1963). The Supreme Court has a long-standing history of protecting the rights of indigent defendants. *See* Griffin v. Illinois, 351 U.S. 12, 17-18 (1956) (holding that indigent defendants were entitled to free trial transcripts for appeal purposes); Douglas v. California, 372 U.S. 353, 357 (1963) (affirming that states were required to provide free counsel for indigent defendants to conduct their first appeal). Before state court application could be considered, the Court reiterated that the fundamental right to counsel exists in federal court proceedings. *Zerbst*, 304 U.S. at 463. *Gideon* unequivocally overruled the standard adhered to during the twenty-one year span of *Betts v. Brady*, where the Court addressed the issue of whether "in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State." 316 U.S. 455, 462 (1942), *rev'd*, 372 U.S. 335 (1963). In the controversial decision, the Court held six to three that the Fourteenth Amendment did not require state-provided counsel, allowing it to affirm an indigent's robbery conviction. *Betts*, 316 U.S. at 457, 473. The common law history of the role of counsel in criminal cases was not "aimed to compel the state to provide counsel for a defendant." *Id.* at 466. The *Betts* test centered around determining if a trial without counsel would be "offensive to the common and fundamental ideas of fairness and right." *Id.* at 473.

[20] *Gideon*, 372 U.S. at 336. Under Florida law, the offense of breaking with the intent to commit a misdemeanor was a felony. *Id.* at 337. An excerpt from the transcript of Mr. Gideon's trial indicates that the judge ruled that he could only appoint an attorney if the defendant was charged with a capital offense. *Id.* Clarence Earl Gideon represented himself in a jury trial where his performance was described as "about as well as could be expected from a layman." *Id.* After serving some jail time, Gideon personally drafted and filed a writ of habeas corpus based on the denial of counsel, which was denied by the Florida Supreme Court. *Id.* The United States Supreme Court granted Gideon certiorari and appointed him counsel as he was proceeding *in forma pauperis*. *Gideon*, 372 U.S. at 338.

[21] *Id.* at 344. The holding revived the Court's conscientious protection of indigent defendants and individuals not capable of acquiring their own counsel. *Id.* In fact, the Court scolded the *Betts* decision as "departing from the sound wisdom upon which . . . *Powell v. Alabama* rested." *Id.* at 345. Following *Gideon*, the Supreme Court remanded twenty-nine state court cases for reconsideration. J.P. Ludington, *Constitutionally Protected Right of Indigent Accused to Appointment of Counsel in State Court Prosecution*, 93 A.L.R. 2D 747, 755 n.14 (2001). Even

C. The "Actual Imprisonment" Rule

In *Argersinger v. Hamlin*,[23] the Court addressed the issue of whether the Sixth Amendment right to counsel only applies to serious crimes or offenses that require a trial by jury.[24] In *Argersinger*, an indigent defendant was charged with carrying a concealed weapon, and he received a three month jail sentence after appearing without a lawyer in a

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though the case is considered revolutionary, the Tenth Circuit Court of Appeals described the Supreme Court's basis as ambiguous and based either on the doctrine of fundamental fairness or the doctrine of selective enforcement. U.S. v. Reilley, 948 F.2d 648, 652 (10th Cir. 1991).

[22] *Gideon*, 372 U.S. at 344. The Court later used a parallel rationale in *United States v. Cronic*, when it stated, "[a]n accused's right to be represented by counsel is a fundamental component of our criminal justice system [and] [l]awyers in criminal cases are 'necessities, not luxuries.'" 466 U.S. 648, 653 (1984) (citing favorably *Gideon*). "Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *Cronic*, 466 U.S. at 654 (quoting Walter V. Schaefer, *Federalism and Stated Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)). The importance of a fair trial cannot be understated, and the Court presumes that a "lawyer is competent to provide the guiding hand that the defendant needs." *Id.* at 658; *see* Michel v. Louisiana, 350 U.S. 91, 100-01 (1955) (stating accused defendants bear evidentiary burdens of demonstrating constitutional violations). In the Court's analysis, Justice Stevens profoundly concluded that "[t]he presumption that counsel's assistance is essential . . . requires us to conclude that a trial is unfair if the accused is denied counsel. . . ." *Cronic,* 466 U.S. at 659.

[23] 407 U.S. 25 (1972).

[24] *Argersinger*, 407 U.S. at 26-27. The Court recognized that the issue had far-reaching public policy implications. *Id.* at 34. Due to the high frequency and volume of misdemeanor offenses in the United States, courts are inevitably preoccupied with quickly moving cases through the system. *Id.* at 35 n.4. This focus often results in inadequate attention to protecting a defendant's rights and it is "clear that . . . there is scant regard for [defendants] as individuals." *Id.* Furthermore, misdemeanor trials are not given the attention they deserve in other aspects, because many courts' attitudes are "rush, rush." *Id.* (quoting William E. Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 THE LEGAL AID BRIEFCASE 151, 152 (1970)). An empirical study also showed that a defendant represented by counsel is five times as likely to have all pending charges dismissed. *Id.*

bench trial.[25] The Supreme Court held that appointed counsel must be provided in all misdemeanor cases where imprisonment is a potential penalty.[26] The Court established a bright-lined "actual imprisonment" standard, reasoning that the judicial system had ample resources to provide assistance of counsel when a sentence deprived a defendant of liberty.[27]

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[25] *Argersinger*, 407 U.S. at 26. In Florida, carrying a concealed weapon is a misdemeanor punishable by imprisonment for up to six months and a $1,000 fine. *Id.* Jon Argersinger, the defendant, only actually received a sentence of three months in jail. *Id.*

[26] *Id.* at 37. The "actual imprisonment" rule's status in 1972 equated to: "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* The Court's holding focused on the end result of the trial and the sentence imposed, which many consider to have a "blurring" effect on the purpose of the Sixth Amendment. B. Mitchell Simpson, *A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?*, 5 ROGER WILLIAMS U. L. REV. 417, 423 (2000).

[27] *Id.* at 32. The Court initially evaluated the various bases for development of Sixth Amendment rights from past cases; *see, e.g.,* Washington v. Texas, 388 U.S. 14, 18 (1967) (requiring notification of all sources of pending prosecutions); Pointer v. Texas, 380 U.S. 400, 403 (1965) (holding that defendants may confront witnesses who are present to testifying against him or her). *Argersinger* used analogous rationale to both *Gideon* and *Powell* by focusing on requirements for providing a fair trial; however, the *Argersinger* facts contained a misdemeanor as opposed to the felony charges present in its predecessors. Simpson, *supra* note 26, at 423. The Court embarked on a cost-benefit analysis, which confirmed Justice Douglas' opinion that counsel is just as necessary in felony cases as misdemeanor trials. *Argersinger*, 407 U.S. at 36. Justice Powell agreed, but expressed concern that the cost of providing counsel in all eligible cases would overburden the judicial system. *Id.* at 58 (Powell, J., concurring). This point has been frequently debated since the Court postulated that an abundance of attorneys are available to fulfill the potential increase in demand. *Id.* at 37; *see* Sonia Y. Lee, *In Light of Budget Cuts, Can the Orange County Office of the Public Defender Provide Effective Assistance of Counsel?*, 29 LOY. L.A. L. REV. 1895, 1927 (1996) (revealing recent survey results from Orange County, California's public defender office concluding "rights of indigent defendants . . . around the country are in serious jeopardy"). *But see* Barton L. Ingraham, *The Impact of* Argersinger*—One Year Later*, 8 LAW & SOC. REV. 615, 631-36 (1974) (stating that *Argersinger's* actual impact on our court system was minimal, requiring a mere shift of local government agencies' concentration towards public defending).

D. Modern Tweaking of the Previous Standard

The Supreme Court modified the distinction based upon "actual imprisonment" in *Scott v. Illinois*.[28] In *Scott*, the defendant was convicted of shoplifting merchandise valued at less than one hundred fifty dollars and, after a non-jury trial, the judge merely issued a fifty dollar fine.[29] The Supreme Court affirmed the conviction, holding that a state only has to afford the assistance of counsel when the criminal defendant is actually sentenced to a "term of imprisonment."[30] The

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[28] Scott v. Illinois, 440 U.S. 367, 369 (1979). The Court was presented with the question of whether to extend the Argersinger holding to situations where defendants are charged with crimes that could statutorily result in sentences of imprisonment, but are not actually punished with incarceration. *Scott*, 440 U.S. at 369-70. In Aubrey Scott's petition to the Supreme Court, he argued that the issue was "left open" because *Argersinger* merely obligates states to provide counsel in some situations. *Id.* In fact, a line of cases supporting this position emerged, most notably *Duncan v. Louisiana*, 391 U.S. 145 (1968). In *Duncan*, the Court agreed that the Fourteenth Amendment incorporated the right to counsel onto the states, but clarified that the right was not subject to the "category of petty offenses" where a jury trial was not required. *Duncan*, 391 U.S. at 159. Two years later, in *Baldwin v. New York*, another arbitrary line was created when Justice White decided that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." 399 U.S. 66, 69 (1970).

[29] *Scott*, 440 U.S. at 368. The offense carried a maximum penalty of one year imprisonment accompanied by a five hundred dollar fine. *Id.* According to Illinois law, theft of property valued at less than one hundred and fifty dollars carried a maximum punishment of a five hundred dollars and one year in jail. *Id.* n.2. (citing 38 ILL. REV. STAT. § 16-1 (1969)).

[30] *Id.* at 373-74. Through the holding, the Court solidified the role of the "actual imprisonment" standard as the "line defining the constitutional right to appointment of counsel." *Id.* at 373. The previous *Argersinger* rule had "proved reasonably workable," but the Court opined that leaving the rule unchanged "would create confusion and impose unpredictable, but necessarily substantial, costs on the 50 quite diverse States." *Id.* at 373. Since *Scott*, the "actual imprisonment" rule has been given virtually universal application. *See* Glover v. United States, 531 U.S. 198, 203 (2001) (holding that "any amount of jail time has Sixth Amendment significance"); Lassiter v. Dept. of Soc. Servs., 452 U.S. 18, 26 (1981) (refusing to expand Sixth Amendment provisions for counsel in cases where prosecution does not result in "loss of personal liberty"). The standard is not, however, without its critics. *Scott*, 440 U.S. at 374-75 (Powell, J., concurring). Justice Powell advocated a "more flexible" rule in his concurrence, which he asserts would better suit the wide variations in the courts across America by evaluating the need of counsel on a case-by-case basis. *Id.* (Powell, J., concurring).

Court reasoned that while the central premise of the "actual imprisonment" rule was "eminently sound," limiting the *Argersinger* test maintained constitutional guarantees while avoiding several significant pragmatic implications.[31]

E. Controversial Constriction of "Gideon-esque" Fundamentals

In *Nichols v. United States*,[32] the Court addressed whether using a prior, uncounseled conviction to increase the severity of a later occurring conviction violated the defendant's right to counsel.[33] In *Nichols*, a defendant was convicted in a Tennessee federal court for conspiracy to distribute cocaine and during the sentencing phase, the judge considered a previous conviction for driving under the influence where the defendant had not been represented by legal counsel.[34] The Supreme Court held that the Sixth and Fourteenth Amendments allow an "uncounseled misdemeanor conviction" to be used to enhance subsequent punishments.[35] The Court reasoned that they were not punishing the previous uncounseled offense, but the secondary offense; therefore, since the previous conviction was constitutional, there were no problems with referencing it for sentencing purposes.[36]

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[31] *Scott*, 440 U.S. at 373. Justice Rehnquist reasoned that constitutional "line drawing" has become more difficult through the progression of Supreme Court jurisprudence, and the incorporation of the Bill of Rights inherently creates unique problems on both the state and federal level. *Id.* at 372. The decision also contains a clear inference that federal law should not infringe upon areas of an individual's behavior that are arguably better regulated by the states. Simpson, *supra* note 26, at 425. Justice Rehnquist also referred to the current status of the Sixth Amendment as "already extended," and although the "general nature of the principle sought to be applied is clear, its precise limits and their ramifications [have] become less so." *Scott*, 440 U.S. at 372.

[32] 511 U.S. 738 (1994).

[33] Nichols v. United States, 511 U.S. 738, 741 (1994). The issue had collateral importance to the general direction of this note as the State of Alabama and *amicus curiae* relied heavily on *Nichols* in arguing that LeReed Shelton was not entitled to counsel. *Shelton*, 122 S. Ct. at 1770-71. The Chief Justice immediately noted that this issue had previously "splintered" the Court in *Baldasar v. Illinois*, 446 U.S. 222 (1980), *overruled by* Nichols v. U.S., 511 U.S. 738 (1994) (holding that prior uncounseled convictions were not "sufficiently reliable to support [subsequent] deprivation of liberty"). *Id.* at 227 (Marshall, J., concurring). In Kenneth Nichols' trial, the District Court for the Eastern District of Tennessee ignored *Baldasar*, stating that the precedent "stands only for the proposition that a prior uncounseled misdemeanor conviction may not be used to create a felony with a prison term." U.S. v. Nichols, 763 F. Supp. 277, 279 (E.D. Tenn. 1991).

[34] *Nichols*, 511 U.S. at 740. After the defendant pleaded guilty to conspiring to possess cocaine with the intent to distribute, the Court surveyed the sentencing guidelines, which used a criminal history point system to determine the severity of the punishment. *Id.* The defendant was sentenced to a maximum term, equating to a twenty-five month longer imprisonment than if the previous

III. *ALABAMA V. SHELTON*

A. *Opinion of the Court*

In *Alabama v. Shelton*,[37] the Supreme Court held that since LeReed Shelton was a criminal defendant and received a suspended sentence, which may have resulted in the "actual deprivation of liberty," Shelton had a constitutional right to counsel in the prosecution for the crime charged.[38]

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uncounseled misdemeanor was not weighed. *Id.* at 741.

[35] *Id.* at 749. It is important to note that the original uncounseled conviction must not have resulted in a "deprivation of liberty," as the Court expressly adhered to *Scott* and ignored *Baldasar*. *Id.* A scathing dissent by Justice Blackmun described the decision as "neither compelled by *Scott* nor faithful to the concern for reliability that lies at the heart of our Sixth Amendment cases since *Gideon* . . . ." *Id.* at 754 (Blackmun, J., dissenting).

[36] *Id.* at 744. The Court further justified the rationale by citing cases that demonstrate "the traditional understanding of the sentencing process, which [is] . . . less exacting than . . . establishing guilt." *Id.* at 747; *see* Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993) (stating judges have always considered various factors in determining criminal sentences); United States v. Tucker, 404 U.S. 443, 446 (1972) (holding there is virtually no limit on information courts may consider in sentencing). The Court did not address a cost analysis as it had in virtually all of its previous holdings, because the Chief Justice refers to Justice Powell's dissent in *Baldasar* to theorize that the court system is not equipped to provide counsel in all types of misdemeanor cases. *Id.* at 746 (referencing *Baldasar*, 226 U.S. at 231 (Powell, J., dissenting)). The Court's reasoning effectively lessened the scope of the right to counsel; for example, Kenneth Nichols had no real reason to seek counsel in his initial charge because he had no way of knowing that anything greater than a $250 fine was at stake in his decision. Erin O'Connell, Nichols v. U.S.: *Prison Terms for Prior Offenses Without the "Guided Hand" or Counsel*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 361, 386 (1996) (citing *Reply Brief for Petitioner* at 10, Nichols v. United States, 511 U.S. 738 (1994) (No. 92-8556)). Many scholars view the scenario in *Nichols* as a blatant denial of the due process right to counsel and a fair trial. *Id.* at 389.

[37] 122 S. Ct. 1764 (2002).

[38] Alabama v. Shelton, 122 S. Ct. 1764, 1767 (2002). Justice Ginsburg deliv-

The Court begian by recognizing that the nation's various circuit courts are not in consensus on the Sixth Amendment right to counsel issue presented in this case.[39] The opinion revisited the progression of Sixth Amendment jurisprudence, reiterating the acceptance of the rationale behind the "actual imprisonment" rule.[40] After discussing several landmark decisions that established the undisputed constitutional maxim, three separate questions presented were considered to resolve the debate.[41]

First, the Court decided that when a state fails to provide counsel to a defendant, the Sixth Amendment cannot allow imprisonment for the later occurring violation of probationary terms.[42] The rationale used to reach this conclusion logically stemmed from the "actual imprisonment" standard developed through *Argersinger* and *Scott*.[43] The state argued to create a

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ered the opinion of the Court. *Shelton*, 122 S. Ct. at 1776. Justice Scalia filed a dissenting opinion, which was joined by the Chief Justice, Justice Kennedy and Justice Thomas. *Id.* Justice Ginsburg noted early in the opinion that the *Argersinger* and *Scott* decisions "control the Court's judgment." *Id.*

[39] *Id.* at 1768. The Court specifically observed that the Eight, Ninth and Tenth Circuit Courts of Appeals believe the right to counsel is a "constitutional prerequisite," while the Fifth Circuit Court of Appeals and the Virginia and Montana Supreme Courts patently disagree with that assertion. *Id.*

[40] *Id.* While the Court cited several cases as background authority, the opinion is mostly grounded in *Argersinger* and *Scott*, evidenced by both the majority and dissent concession that the "actual imprisonment" standard is the accepted rule to base Sixth Amendment decisions. *Id.* Justice Scalia stated in his dissent that he also acknowledges the Supreme Court cases affirming the "actual imprisonment" rule. *Id.* at 1776 (Scalia, J., dissenting).

[41] *Id.* at 1769. The Court stated that "[t]hree positions are before us in this case." *Id.* First, where the state does not provide counsel to an indigent defendant, does the Sixth Amendment allow activation of a suspended sentence when the defendant violates the terms of probation? *Id.* at 1771. The second question is whether "practical considerations" are important enough to decline extending the right to counsel. *Id.* Finally, the third position the Court addresses is whether the probationary time period should be considered separate from imprisonment that occurs from a probation violation. *Shelton*, 122 S. Ct. at 1775.

[42] *Id.* at 1770. The Court stated the issue in the form of a rhetorical question, and promptly answered it in the negative. *Id.* Although this portion of the analysis is the heart of the opinion, the Court does not waiver on the answer, and precisely maintains that *Argersinger* and *Scott* do not allow any other conclusion. *Id.*

[43] *Shelton*, 122 S. Ct. at 1770. The Court imports language directly from *Argersinger*, stating that if a sentence "end[s] up in the actual deprivation of a

dichotomy between immediate and subsequent imprisonment which would require separate, independent analyses, but these positions were rejected by the Court.[44]

Next, the Court addressed the practical question of how far the Sixth Amendment should be extended in light of the cost of judicial resources.[45] The debate largely centered on the state's ability to provide appointed counsel in all cases involving suspended sentences, while still being able to utilize the benefits of probationary punishment.[46] The Court used a balancing test approach to the question, weighing the practical benefits of suspended sentences and the effects of a reduction in Sixth Amendment protection.[47] The Court disputed *amicus*' propositions favoring the practice of counseled revocation hearings, recognizing that such hearings are separate from the

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person's liberty" then the defendant must have been accompanied by an attorney at trial." *Id.* The language has a profound impact on the Court's direction because it perceived that the words "ends up" indicate imprisonment can never result after a defendant is convicted absent counsel. *Id.* at 1771.

[44] *Id. Amicus* attempts to align its argument with Nichols v. United States, 511 U.S. 738 (1994) and Gagnon v. Scarpelli, 411 U.S. 778 (1973), by claiming that the holdings establish that "[s]equential proceedings must be analyzed separately for Sixth Amendment purposes," and that "actual imprisonment" only applies to immediate deprivations of liberty. *Shelton*, 122 S. Ct. at 1770. The Court responds by stating *Nichols* and *Gagnon* do not "stand for the broad proposition [that] *amicus* would extract from them. *Id.* at 1771. Relying on *Nichols*, Justice Ginsburg openly rejects *amicus*' propositions, and concludes not only do the cases factually differ, *Nichols* used a "less exacting" standard "consistent with the traditional understanding of the sentencing process." *Id.* (citing *Nichols*, 511 U.S. at 747). In fact, the Court boldly proposed that a relaxed standard has "no application in this case," as the issue at hand involved whether Shelton could be imprisoned without facing a "reliable" conviction. *Id.*

[45] *Id.* at 1771. A basic assumption of *amicus*' argument was that of the vast number of uncounseled defendants receiving probationary punishments, only a fraction of them were ever incarcerated. *Id.*

[46] *Id.* at 1772. *Amicus* proposed a "workable solution" to the Court whereby imposing a suspended sentence would be permitted, but then state appointed counsel would be provided at the probation revocation hearing, since the revocation stage is the time period when incarceration is most imminent. *Id.*

[47] *Shelton*, 122 S. Ct. at 1772. The Court rejected this proposition because "preservation of that tool [does not] warrant[] the reduction of the Sixth Amendment's domain that would result from the regime *amicus* hypothesizes." *Id.* The balance is further tilted in favor of expanding the Sixth Amendment because *amicus* failed to describe the details of the revocation hearing that it proposed; therefore, the court logically concluded that they must err on the side of constitutional protection. *Id.*

adjudication of guilt; therefore, the nature of the hearing could not possibly apprise the defendant of rights, which theoretically should have already been provided.[48]

The issue is also debated in the context of whether *Shelton* will hinder the states' ability to impose probation on defendants where imprisonment was conditional.[49] The Court dealt with the issue by referencing examples of states that provide assistance of counsel more abundantly than the Federal Constitution warrants.[50] Justice Ginsburg stated that "even if *amicus* is correct that 'some jurisdictions [can] not bear' the costs," the option of pretrial probation exists to cater to those "small percentage" of cases.[51]

Finally, the Court rejected the State of Alabama's contention that Shelton's two-year probation is within constitutional bounds because the punishment was determined with "not so much as a hint" that the probation was severable from the jail term in which it was attached.[52] The Court noted that appellate review was confined to the decision by the Alabama Supreme Court, and the majority in *Shelton* was satisfied the Alabama court had correctly determined that the defendant was entitled to the assistance of counsel.[53]

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[48] *Id.* The Court pointed out that "a hearing so timed and structured cannot compensate for the absence of trial counsel." *Id.* The Sixth Amendment question asked if the adjudication of guilt is sufficiently valid to allow the subsequent imprisonment. *Id.* Therefore, the Court stated that the mere presence of counsel at a revocation hearing would not change the fact that the indigent defendant was convicted absent "the crucible of meaningful adversarial testing." *Id.* (citing *Cronic*, 466 U.S. at 656).

[49] *Id.* The Court considered this issue as the dissent's "variation on amicus' position." *Id.* The dissent's position is characterized as "mak[ing] little sense" because Justice Scalia would limit the question presented to whether imposing Shelton's suspended sentence requires the assistance of counsel. *Id.* In addition, the Court considered the argument oversimplified as the actual sentencing of a suspended sentence does not in itself deprive a defendant of liberty. *Id.*

[50] *Id.* at 1773. In fact, the Court stated that all but sixteen states in the union would have already provided counsel to a defendant in Shelton's situation either because of the severity of the fine or because the offense carries one year potential imprisonment. *Id.* at 1774. The Court concluded that in light of most states procedural laws the majority of states will not face any obstacles in providing counsel to these defendants. *Id.* n.8. Finally, relying on these citations, the Court concluded "providing counsel routinely in suspended sentence cases will not prove unduly onerous." *Id.* n.10.

[51] *Id.* at 1774. Pretrial probation is practiced in twenty-three states, and involves the prosecutor and defendant working out an agreement whereby the defendant participates in a pretrial rehabilitation program. *Id.* at 1775. The central difference is pretrial probations are based on the defendant's consent, so it does not create the issue of "whether imposition of probation alone so restrains a defendant's liberty as to require provision of appointed counsel." *Id.* n.11. The main difference between the majority's suggested solution and the dissent's is the argument that pre-trial probation is less expensive because it only requires one trial. *Id.* n.12.

B. Justice Scalia's Dissenting Opinion

Justice Scalia dissented in the *Shelton* decision and emphasized that until a suspended sentence is activated, the punishment has not caused and may never cause a deprivation of liberty.[54] Justice Scalia contended that the majority's opinion was "rank" with speculation, as the Court "miraculously divined" how the Alabama Supreme Court would conduct a revocation hearing.[55] Furthermore, Justice Scalia specifically criticized the Court for making an advisory opinion, and he asserted that the decision is outside the scope of the narrow question presented.[56] The dissent also advocated that state interests are better served by allowing the individual states to make their own decisions, which would preserve less costly alternatives for states with already strained public defending programs.[57] Finally, Justice Scalia cited significant findings supporting his assertion that relatively poor states, such as Alabama and Mississippi, may not be able to bear the burden of providing counsel in seemingly insignificant cases.[58]

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[52] *Shelton*, 122 S. Ct. at 1776. The State of Alabama initiated the argument too late in the litigation and according to the Court, "in the wrong forum." *Id.* The Court points out that it is the Alabama Supreme Court's task to determine if Shelton's probationary punishment is still valid and "independently effective." *Id.*

[53] *Id.* The Supreme Court stayed on task by restraining its review to the questions presented; however, the Court referred to the state's assertion that punishments are separate as without basis because the Attorney General of Alabama admitted that no state has the policy of issuing probation absent a suspended sentence. *Id.* The other four Justices following the opinion of Justice Ginsburg were Justices Souter, Breyer, O'Connor and Stevens. *Id.* at 1767.

[54] *Id.* at 1777 (Scalia, J., dissenting). Justice Scalia believed that it was too far removed from "actual imprisonment" simply because a suspended sentence "may" result in the deprivation of liberty. *Id.* (Scalia, J., dissenting). Justice Scalia gave a hypothetical example containing three contingencies to demonstrate the several events which must occur before the defendant could face jail time. *Id.* (Scalia, J., dissenting). Furthermore, the dissent stated that even if all three events did occur, the Alabama Supreme Court would follow its prior case law to determine the proper procedures for a revocation hearing, and thus *Argersinger* and *Scott* would not be controlling. *Id.* (Scalia, J., dissenting).

[55] *Id.* (Scalia, J., dissenting). Justice Scalia claimed that the Court made an error in deciding that the Alabama Supreme Court had already resolved the question presented. *Id.* n.1 (Scalia, J., dissenting). Justice Scalia reasoned that the Alabama court could not have possibly addressed the issue since it did not consider the issue of whether specific procedures for the revocation hearing could cure the lack of counsel for the defendant at trial. *Id.* (Scalia, J., dissenting).

IV. DISCUSSION

In *Alabama v. Shelton*, the United States Supreme Court expanded the scope of the Sixth Amendment right to counsel for defendants sentenced to probationary punishments.[59] The Court emphasized that suspended sentences may end up in the loss of liberty, placing little importance on the fact that a defendant may never be imprisoned.[60] While the Court vowed strict adherence to the "actual imprisonment" rule, established over the past forty years, it shrugged the practical concerns of state expenses and adequacy of state created criminal procedure.[61]

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[56] *Id.* (Scalia, J., dissenting). Justice Scalia considered the majority to have offered an advisory opinion because the Court was only supposed to address whether "'imposition of a suspended or conditional sentence in a misdemeanor case invoke[s] a defendant's Sixth Amendment right to counsel.'" *Id.* (Scalia, J., dissenting). Justice Scalia pointed out that the Court has a tradition of not issuing advisory opinions, and that he was "amazed" by the majority's decision to expand the scope of the decision past the narrow question presented. *Id.* (Scalia, J., dissenting).

[57] *Shelton*, 122 S. Ct. at 1778 (Scalia, J., dissenting). Justice Scalia based the argument on the Court's "doubts" that any state created procedures to govern a revocation hearing would be ample enough to provide a defendant of his or her Sixth Amendment rights. *Id.* (Scalia, J., dissenting). His "states rights" approach begged the question of why the Court will not allow states to create options as they see fit under what Justice Scalia refers to as the "sensible option." *Id.* (Scalia, J., dissenting).

[58] *Id.* n.4 (Scalia, J., dissenting). Justice Scalia again argued that if the Court views post-trial and pre-trial probations as "functional equivalents," then the states should have the choice of which "functional equivalent" they prefer. *Id.* n.2 (Scalia, J., dissenting). Justice Scalia stressed the importance of states' autonomy because each of the fifty states has diverse characteristics, and the solution must be narrowly tailored to the abilities of each particular state. *Id.* at 1780 (Scalia, J., dissenting). Furthermore, Justice Scalia pointed out that although many states do provide more generous protection than the Sixth Amendment requires, the mere volume of suspended sentence cases unacceptably increases the costs to the states. *Id.* n.4 (Scalia, J., dissenting).

[59] *See supra* note 42 and accompanying text. *Shelton* is a victory for the indigent defendant as the right to counsel has expanded once again in their favor. *See supra* note 30 and accompanying text.

By requiring all convictions which result in a suspended or probationary sentence to be accompanied by appointed counsel, the Court has forced the states to provide attorneys in cases involving minor misdemeanors.[62] As a result, the ruling will prevent states from activating terms of imprisonment for probation violators that were convicted absent counsel.[63] In interpreting the "actual imprisonment" standard for situations that do not necessarily result in "actual imprisonment," the Supreme Court has indicated that the indigent misdemeanant's right to counsel outweighs the states' interests in self-management and expense reduction.[64] In fact, states such as Alabama, Mississippi and Arkansas, which the dissent regards as "poor," will be expected to bear the cost of providing a defense for an increased number of indigent defendants.[65] The speculation as to how much burden these types of states can bear is temporarily quieted because only time can determine which methods will effectively achieve a pragmatically feasible solution.[66]

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[60] *See supra* notes 44, 54 and accompanying text. The issue proved to be an irreconcilable difference between the majority and dissent, since the opinion foreshadows the scope in which the majority believes "actual imprisonment" should be construed. *See supra* notes 43, 55 and accompanying text.

[61] *See supra* note 46 and accompanying text. Building on the traditions of *Argersinger*, it logically followed that since the Court considered a probationary sentence to be the equivalent of a deprivation of liberty, the "actual imprisonment" standard would require the presence of representative counsel at trial. *See supra* note 43 and accompanying text.

[62] *See supra* note 30 and accompanying text. Requiring the attention of an attorney in lesser misdemeanors would unquestionably increase the need for criminal attorneys as well as funding to pay extra salaries for the various court officers. *See supra* notes 27, 46, 50 and accompanying text. The risk is justified by how serious the American society considers the loss of one's liberty. *See supra* note 30 and accompanying text.

[63] *See supra* note 42 and accompanying text. Now states are not able of activating probationary sentences for such individuals; therefore, the sentences issued absent counsel serve no purpose. *See supra* note 6 and accompanying text.

[64] *See supra* note 47 and accompanying text. Again, the debate has political overtones because cost and convenience were constantly pitted against a defendant's Sixth Amendment interests. *See supra* notes 27, 36, 47 and accompanying text.

In terms of rule interpretation, the Court adopted a broad meaning to the word actual; however, the pro-defendant triumph in *Shelton* accomplished the difficult task of resolving the conflict among the nation's courts.[67] Public policy also implicates law enforcement incentives because the scenario may arise where convicted criminals cannot be incarcerated.[68] As real as these concerns may be, a common sense approach indicates that justice is probably more likely to be administered when a defendant appears with the assistance of counsel.[69] Among the many things *Shelton* may stand for, most significant is probably the Court's reluctance to put the

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[65] *See supra* notes 57, 58 and accompanying text. More conclusive statistical studies would need to be completed before this position gains credibility because the point is sharply contested by the Court's majority. *See supra* notes 50, 58 and accompanying text. Whatever the result, Alabama, Mississippi and Arkansas will face challenges in accommodating for *Shelton* as their judicial resources are not overly bountiful and a large number of indigent defendants facing suspended sentences exist. *See supra* notes 57, 58 and accompanying text.

[66] *See supra* note 27 and accompanying text. Several scholarly journals claim that the burden will be minimal as many states already have some protections built into their statutory codes; however, many others hypothesize that states will be overburdened and the quality of due process may deteriorate. *See supra* note 27 and accompanying text.

[67] *See supra* notes 39, 40 and accompanying text. Supreme Court review should be given deference in light of the need for uniform resolution among courts because although some opine that state's rights are being compromised, constitutional interpretation is a priority of the Court, and as such, a slight expansion of the question presented should be accepted. *See supra* notes 8, 9 and accompanying text.

[68] *See supra* notes 26, 42, 54 and accompanying text. If criminals are being haled into court and receiving suspended sentences, and then later incarceration cannot be imposed after the misdemeanant violated the probation terms, it is possible that police and state officials could be discouraged as the efforts of the system would essentially have been in vain. *See supra* note 42 and accompanying text.

[69] *See supra* notes 22, 50 and accompanying text. In the adversarial court system the "guiding hand" of counsel is invaluable because even if a layman presents his or her case in the an outstanding manner, the representation of a competent, professional advocate will virtually always improve the defendant's position. *See supra* note 24 and accompanying text.

"common man" in jeopardy even if the burden on the states is significant and jail time is a distant possibility contingent on a multitude of occurrences.[70]

V. CONCLUSION

Alabama v. Shelton expands the Sixth Amendment right of a defendant by requiring free, state appointed counsel in cases where a defendant is sentenced to a probated sentence of imprisonment. In *Shelton*, the United States Supreme Court rationalized the connection between suspended sentences and the loss of liberty, which traditionally invokes the actual imprisonment standard. By rejecting claims that a suspended sentence does not deprive liberty, even though the threat of incarceration may be distant, the Supreme Court has interpreted the standard in a broad sense which greatly favors defendants. In choosing this route, the Court has lessened state discretion and adopted a rule to be applied universally in all jurisdictions regardless of the availability of resources or other equivalent, state imposed options. The Supreme Court in *Shelton* has made clear that the Sixth Amendment right to counsel is a cornerstone to the concept of a fair trial, and no citizen's freedom will be threatened without the guiding hand of competent counsel.

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[70] *See supra* notes 24, 54, 58 and accompanying text. The bold interpretation should create a heightened awareness for state courts procedural rulings when a defendant comes to trial absent an attorney because it is now meaningless for a court in such a situation to impose a sentence that has the possibility, no matter how remote, of incarceration. *See supra* note 40, 42, 47 and accompanying text.

[*] Dedicated to my wife, Anne Marie, for never ceasing to amaze me.

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